TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 268.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

O. J. NICHOLS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 21, 1923.

CERTIORARI AND RETURN FILED JULY 25, 1923.

(29,503)

(29,503)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Page.
Names and addresses of attorneys	1
Citation and service	2
Writ of error	3
Record from superior court of Los Angeles County	5
Summons	5
Complaint	8
Notice of petition for removal	13
Petition for removal	15
Bond on removal	19
Order for removal	23
Record from U. S. district court for the southern district of California.	25
Demurrer	25
Notice of submission of cause	31
Order of submission	32
Order overruling demurrer	33
Answer	33
Amendment to complaint	40

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Page.

Stipulation waiving jury trial 42
Defendant's request for findings of fact 43
Plaintiff's request for findings of fact 46
Findings of fact and conclusions of law 48
Judgment 49
Clerk's certificate to judgment 51
Assignment of errors 52
Petition for writ of error 54
Order allowing writ of error 55
Cost bond 57
Præcipe for transcript of record 60
Clerk's certificate 61
Proceedings in C. C. A. 63
Order of submission 65
Order filing opinion and decree 66
Opinion, Ross, J. 67
Judgment 75
Order denying petition for rehearing 77
Order staying issuance of mandate 78
Clerk's certificate 79
Writ of certiorari and return 81

Names and Addresses of Attorneys:

For Plaintiff in Error:

MILTON K. YOUNG and LYNDOL L. YOUNG, Esqs., Pacific Mutual Building, Sixth and Olive Sts., Los Angeles, Calif.

For Defendant in Error:

E. W. CAMP, PAUL BURKS and ROBERT BRENNAN, Esqs., Kerckhoff Building, Sixth and Main Sts., Los Angeles, Calif.

UNITED STATES OF AMERICA, SS.
To THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24th day of July A. D. 1922, pursuant to a Writ of Error on file in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action No. 1010 Civil wherein O. J. Nichols is Plaintiff in Error and you are defendant in error to show cause, if any there be, why the judgment given, made and rendered against the said plaintiff O. J. Nichols in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet United States District Judge for the Southern District of California, this 28th day of June, A. D. 1922, and of the Independence of the United States, the one hundred and forty sixth.

Trippet

U. S. District Judge for the Southern District of California.

No. 1010 Civil U. S. DISTRICT COURT, Southern District of California. O. J. Nichols v. Atchison,

Topeka & Santa Fe Railway Co., corp. Citation FILED JUN 29 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk

[Endorsed]: Original In the United States Circuit Court of Appeals for the NINTH CIRCUIT O. J. NICHOLS, Plaintiff in Error vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in error. Citation Received copy of the within this 28th day of June, 1922. E W Camp Robert Brennan E. J. Lucey Attorneys for Defendant.

UNITED STATES OF AMERICA, SS.

The President of the United States of America,
To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between O. J. NICHOLS, Plaintiff in Error, and Atchison, Topeka and Santa Fe Railway Company, a corporation, Defendant in Error a manifest error hath happened, to the great damage of the said Plaintiff in error, O. J. Nichols as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the fourteenth day of July next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM H. TAFT, (SEAL) Chief Justice of the United States, this 15th day of June in the year of our Lord one thousand nine hundred and twenty two and of the Independence of the United States the one hundred and forty sixth.

Chas N Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

Trippet

Judge.

I hereby certify that a copy of the within Writ of Error was on the 15th day of June, 1922, lodged in the office of the Clerk of the said United States Dis-

trict Court, for the Southern District of California, Southern Division, for said Defendants in Error.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States for the Southern District of California.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: Original 1010 Civ. United States Circuit Court of Appeals for the NINTH CIRCUIT O. J. NICHOLS, Plaintiff in Error vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in Error Writ of Error FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

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IN THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES STATE OF CALIFORNIA

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. B-94614 Action brought in the Superior Court of the County of Los Angeles, and Complaint Filed in the Office of the Clerk of the Superior Court of Said County.

THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETINGS TO:

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Su-

perior Court of the County of Los Angeles, State of California, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 18th day of June, 1921

(SEAL SUPERIOR COURT LOS ANGELES COUNTY) L. E. LAMPTON, County Clerk.
By G W McDonald
Deputy.

COUNTY OF LOS ANGELES,)
STATE OF CALIFORNIA,)
) ss.

.....being sworn, says: I am and was at the time of the service of the summons herein, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles, State of California, at the times set opposite their respective names,

a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Names of Defendants Served	Time of Service
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

My Fees for Services are, $.....for.....miles actually traveled at.....cents per mile, $....., Total $.....

.....

Subscribed and sworn to before me, this..... day of.....192....

L. E. LAMPTON, County Clerk.

By .....

Deputy.

No..... SUPERIOR COURT COUNTY OF LOS ANGELES ..... vs ..... SUMMONS ..... Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES.

-------oOo-------

Plaintiff complains of defendant and for cause of action alleges:

I.

That the defendant, Atchison, Topeka & Santa Fe Railway Company now is and at all the times herein mentioned has been, a corporation, duly organized and existing under the laws of the State of Kansas, engaged during all of said times in the operation of a steam railroad from the cities of San Diego and Los Angeles, in the State of California, to the city of Chicago, State of Illinois, upon which line of defendant the defendant operated regular passenger trains for the transportation of persons for hire.

II.

That on the 20th day of June, 1920, the said plaintiff and his wife, Mary J. Nichols, took passage upon

one of defendant's vestibuled trains at the town of Fallbrook in the County of San Diego, a way-station on said line of railroad, to the city of Chicago, and paid to defendant the fixed and established fare for their transportations between said Fallbrook and said City of Chicago.

III.

That plaintiff's said wife at said time was of the age of about seventy-five (75) years. That about twelve o'clock noon on the 22nd day of June, 1920, and while plaintiff and his said wife were passengers on said train as aforesaid, and when said train was about four (4) miles Westerly of the city of Las Vegas in the State of New Mexico, toward which city said train was travelling, said Mary J. Nichols left her seat in the car in which she was travelling, for the purpose of going to the ladies' dressing room therein, which dressing room was next adjacent to the car door leading to one of the platforms of said car. That while the said Mary J. Nichols was in the vicinity of said dressing room and the then open car door, the said car was jerked and jarred with great force and the said Mary J. Nichols was thereby thrown from the train with great force and violence, through the trap door and vestibule door of said car, both of which were then and for some time previously had been left open by the said defendant. That at said time it was and for a long time previously thereto had been, the custom of defendant to keep the trap doors

and vestibule doors of its cars closed while the train was in motion, and the leaving of said doors open as aforesaid was gross carelessness and negligence on the part of defendant. That the said Mary J. Nichols was greatly hurt, bruised and injured by being thrown from said train as aforesaid, and died from the effects thereof in the city of Las Vegas, State of New Mexico, on the first day of July, 1920.

IV.

That the said Mary J. Nichols was a good and faithful housekeeper and performed all the domestic household duties usually performed by a wife, and she at all times aided, advised and assisted her husband, the plaintiff herein, in conducting his affairs and in the management of their home. That the said Mary J. Nichols under the American Experience Tables of Mortality, had a life expectancy of 6.27 years. That plaintiff has been damaged in the loss of her services as a housekeeper and in the loss of the aid, advice and assistance which she was accustomed to rendering him in the conducting of his affairs and in the management of their home, in the sum of Fifteen thousand dollars ($15,000.00).

V.

Upon information and belief plaintiff alleges that under the laws of the State of New Mexico, the surviving husband is entitled to recover for the loss of his wife consortium damages or damages by reason of the loss of her society, love and affection. That plaintiff and his said wife had been married for upwards of

fifty (50) years and had at all times sustained toward each other the greatest love and affection, and plaintiff has been damaged by reason of the loss of the society, love and affection of his said wife in the sum of Twenty thousand dollars ($20,000.00).

VI.

That plaintiff has been further damaged by reason of the death of his said wife as follows:

Tickets for self and wife to Chicago,	$147.00
Care of wife at Las Vegas Hospital,	60.65
Paid Doctor for medical attention,	40.00
Paid Undertaker at Las Vegas,	87.00
Telegrams,	14.60
Drug Store,	1.50
Return ticket for plaintiff to San Jose,	103.27
Transfer of corpse of wife at Stockton, California,	3.00
Carried Forward,	$457.02
Carried Forward,	$457.02
Undertaker at San Jose,	62.00
Cemetery lot,	35.00
Railroad fare from San Jose to Fallbrook,	17.40
Sundry items,	15.00
	$ 586.42

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifteen thousand dollars ($15,000.00) for the loss of the services of the said wife, Mary J. Nichols, and for the loss of aid, advice and assistance which she was accustomed to rendering

him in conducting his affairs and in the management of their home; the sum of Twenty thousand dollars ($20,000.00) for the loss of the society, love and affection of the said wife, and the further sum of Five hundred eighty-six and 42/100 dollars ($586.42) for payments made by reason of the death of his wife as alleged in paragraph VII of the complaint, and for his costs of suit herein.

Milton K Young

Lyndol L. Young

Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
County of San Diego)

O. J. Nichols, being by me first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has heard read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are herein stated upon his information or belief, and as to those matters that he believes it to be true O. J. Nichols

Subscribed and sworn to before me this 15 day of June, 1921

(Seal) Saml. H. Graffin

Notary Public in and for San Diego County, State of California

My commission expires April 26 - 1923

[Endorsed]: No. B-94614 Dept--- IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA In and for the County of Los Angeles O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation Defendant COMPLAINT DAMAGES. Filed Jun 18 1921 L. E. Lampton County Clerk By G. W. McDonald, Deputy MILTON K. YOUNG LYNDOL L. YOUNG ATTORNEYS AT LAW Suit 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. NOTICE.

TO O. J. NICHOLS, plaintiff above named, and to MILTON K. YOUNG AND LYNDAL L. YOUNG, his attorneys:

YOU AND EACH OF YOU will please take notice that on the 2nd day of July 1921, at 10 o'clock a. m.,

or as soon thereafter as counsel can be heard, the defendant above named will present to the Superior Court of the State of California, in and for the County of Los Angeles, in the court room of the presiding judge of said court, in Department 10, its petition for and bond on removal of the above entitled action from the above entitled court to the District Court of the United States, for the Southern District of California, Southern Division, pursuant to the statutes in such cases made and provided, and that copies of said petition and bond are hereunto annexed and made a part hereof.

Dated at Los Angeles, California, June 28, 1919.

E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Defendant.

(Over)

[Endorsed]: Received copy of the within Notice this 28 day of June 1921 M. K. Young & L. L. Young Attorneys for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. PETITION FOR REMOVAL.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, and presents this its petition and by it respectfully shows:

I

That The Atchison, Topeka and Santa Fe Railway Company, a corporation, is defendant in the above entitled action; that at the time of the commencement of this action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Kansas, having its principal place of business in the City of Topeka, in said State, and that it is not now and was not at the time of the commencement of this action and never has been a corporation organized and existing under or by virtue of the laws of the State of California; that it was at all of said times a citizen and resident of the State of

Kansas, and that it is not now and was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of said State of Kansas and a non-resident of the State of California.

II

That O. J. Nichols, the plaintiff in the above entitled action, was at the time of the commencement of said action and ever since has been and now is a citizen and resident of the State of California, and that said plaintiff was not at any of the times and is not now a citizen or resident of the State of Kansas, but at all of said times said plaintiff was and now is a non-resident of the said State of Kansas.

III

That the above entitled action is a suit of a civil nature brought by the plaintiff to recover a judgment against your petitioner for damages in the sum of $35,586.42 on account of the death of his wife, Mary J. Nichols, July 1, 1920, as the result of injuries sustained June 22, 1920, according to the allegations of the complaint, while a passenger on train of petitioner en route from Fallbrook, California, to Chicago, Illinois.

IV

That the complaint in the above entitled action was filed on or about the 18th day of June, 1921, and summons was issued thereupon, which said summons, together with copy of the complaint, was served upon your petitioner at Los Angeles in the County of Los

Angeles, State of California, on the 24th day of June, 1921. That according to the laws of the State of California, the time within which your petitioner is required to appear and answer, demur, or otherwise plead in said action, has not yet expired, and your petitioner has not answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V

That the amount in controversy in the above entitled action exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

VI

That this is a suit in which there is a controversy between the citizens of different states, and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

VII

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will, within thirty days from the filing of this petition, enter a certified copy of the record in the above entitled court in the United States District Court for the Southern District of California, Southern Division, and that your petitioner will pay all costs that may be awarded by said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

WHEREFORE your petitioner prays that this court accept this petition and said bond and surety, and that

said action be removed into said District Court of the United States, for the Southern District of California, Southern Division, pursuant to the statutes of the United States in such cases made and provided; and that this court proceed no further in this action, except to make an order of removal as prayed for, accept and approve the bond presented herewith, and direct the Clerk of this court to prepare a certified copy of the record in the above entitled action for entry in said District Court of the United States.

And your petitioner will ever pray, etc.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

BY E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Petitioner

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

W. H. BREWER, being by me first duly sworn, deposes and says: that he is Assistant to the General Manager of The Atchison, Topeka and Santa Fe Railway Company, the Defendant in the above entitled action; that he has read the foregoing Petition for Removal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are herein stated upon his informa-

tion or belief, and as to those matters that he believes it to be true.

W. H. BREWER,

Subscribed and sworn to before me this 28th day of June, 1921

(Seal) C. N. Stedman,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Petition for Removal this 28th day of June, 1921. M. K. Young & L. L. Young Attorney for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, as principal, and NATIONAL SURETY COMPANY, a cor-

poration, as surety, are held and firmly bound unto O. J. Nichols, the plaintiff in the above entitled action, his heirs, executors and administrators, in the sum of One Thousand Dollars, lawful money of the United States of America, for the payment of which well and truly to be made they and each of them bind themselves, their and each of their successors and assigns, as the case may be, jointly and severally, firmly by these presents.

THE CONDITION of this obligation is such that:

WHEREAS, the above named defendant has applied by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending wherein O. J. NICHOLS is plaintiff, and The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, is defendant, to the District Court of the United States, for the Southern District of California, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action be stayed;

NOW, THEREFORE, if the above named defendant shall within thirty days from and after the date of the filing of said petition enter in said District Court of the United States a duly certified copy of the record in the above entitled action and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States if such court shall hold that such suit was wrongfully or improperly re-

moved thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Dated: June 28th, 1921.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By W. H. Brewer

Its Asst. to General Manager.

Attest: G. Holterhoff Jr

Its Assistant Secretary

Principal.

NATIONAL SURETY COMPANY,

(Seal) By Chas Seyler Jr

Surety.

The premium charged for this bond is One dollars for the term thereof. Revenue stamps not required on Bonds of this kind

The foregoing bond is hereby approved as to form and sufficiency of surety this 29 day of June, 1921.

John W Shenk

Judge.

STATE OF CALIFORNIA)
) ss:
County Los Angeles)

On this 28th day of June, in the year 1921, before me E. W. Gray, a Notary Public in and for said

County and State, residing therein duly commissioned and sworn personally appeared Chas. Seyler Jr., known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the NATIONAL SURETY COMPANY, a Corporation, and acknowledged to me that he subscribed the name of the NATIONAL SURETY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) E W Gray

Notary Public in and for said County and State

My Commission expires Oct. 16, 1924

[Endorsed]: No. B-94614 Dept.--- IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA In and for the County of Los Angeles O. J. Nichols Plaintiff vs Atchison, Topeka and Santa Fe Railway Company Defendant Bond on Removal Received copy of the within Bond on Removal this 28th day of June 1921 M. K. Young & L. L. Young Attorneys for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy E. W. CAMP PAUL BURKS U. T. CLOTFELTER M. W. REED ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for------

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. ORDER FOR REMOVAL.

The defendant in the above entitled action having within the time provided by law filed its petition in due form for the removal of said action to the District Court of The United States, for the Southern District of California, Southern Division, and having at the same time offered a good and sufficient bond, as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States;

NOW, THEREFORE, it is hereby ordered that said action be removed into the District Court of the United States, for the Southern District of California, and that all further proceedings in this court in said action be and they are hereby stayed, and the clerk of this court is hereby directed to make a certified copy

of the record in said action for entry in said United States District Court.

DONE this 29th day of June, 1921.

"John W Shenk"

Judge.

Plaintiff consents to the above order being made at any time 6/29/21 M. K. Young & L. L. Young, Attys for Plff.

[Endorsed]: Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, L. E. LAMPTON, County Clerk and Ex-officio Clerk of the Superior Court in and for said County and State, do hereby certify the foregoing complaint, notice, petition for removal, bond on removal and order for removal in the case of O. J. Nichols, plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. B-94614 to be full, true and correct copies of the originals on file in my office.

WITNESS my hand and seal of the Superior Court this 11th day of August, 1921.

(Seal)

L. E. Lampton,
County Clerk.
By D M Forbes,
Deputy

[Endorsed]: 1010 Civ. O. J. Nichols vs. The Atchison, Topeka & Santa Fe Ry. Co., a Corporation CERTIFIED COPY OF RECORD on Removal FILED AUG 11 1921 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. 1010 Civil. DEMURRER.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, the defendant in the above entitled action, and demurs to the complaint on file herein upon the grounds following:

I.

That the plaintiff has not the legal capacity to sue herein, the complaint predicating liability in damages

upon the law of the State of New Mexico in which State it is alleged that the plaintiff's decedent received injuries causing her death and the cause of action, if any there is, for the alleged wrongful death of the plaintiff's decedent is pursuant to the provisions of Section 1821 of the New Mexico Statutes Annotated (Codification 1915) and by Section 1823 of said New Mexico Statutes Annotated it is provided that "every such action as mentioned in Section 1821 shall be brought in the name or names of the personal representative or representatives of such deceased person."

II.

That there is a defect of parties plaintiff in that complaint upon the face thereof shows that the action is for damages for the alleged wrongful death of Mary J. Nichols through alleged injuries suffered while a passenger upon the defendant's railway in the State of New Mexico, and such an action must be prosecuted by a personal representative or representatives, to-wit, an executor or executors, or administrator or administrators of the estate of Mary J. Nichols, deceased, and cannot be maintained or prosecuted by the plaintiff in his individual capacity.

III.

That the complaint does not state facts sufficient to constitute a cause of action, because plaintiff sues in his individual capacity and under the laws of the State of New Mexico, where it is alleged Mary J. Nichols received the injuries causing her death, the action must be brought in the name or names of the

personal representative or representatives of the deceased.

WHEREFORE defendant prays the judgment of this honorable Court as to the sufficiency of said complaint and that it may be dismissed hence with its costs in its behalf incurred.

E. W. CAMP,

PAUL BURKS,

ROBERT BRENNAN.

Attorneys for Defendant.

CERTIFICATE OF COUNSEL:

I, Robert Brennan, being one of the Attorneys of record for the defendant in the above entitled action, do hereby certify that in my opinion the foregoing Demurrer is well founded in point of law.

Robert Brennan

AUTHORITIES IN SUPPORT OF PROPOSITION THAT SUIT CANNOT BE PROSECUTED BY PLAINTIFF IN INDIVIDUAL CAPACITY.

New Mexico Statutes, Annotated (Codification 1915), Sec. 1821,

New Mexico Statutes, Annotated (Codification 1915), Sec. 1823.

The Sections of the New Mexico Statutes above cited are as follows:

"Section 1821. PERSON CAUSING DEATH OF

ANOTHER - LIABILITY IN DAMAGES.

Sec. 2. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

Act of Feb. 19, '91: L. '91 C. 49, Sec. 1; C. L. '97, Sec. 3214.

Cited in Romera v. A. T. & S. F. Ry. Co., 11 N. M. 679, 72 Pac. 37.

Section 1823. ID. - WHO MAY SUE - DAMAGES - DISTRIBUTION.

Sec. 4. Every such action as mentioned in section 1821 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neg-

lect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, He or she shall have left a husband, wife, child father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

Act. of Feb. 19, '91; L. '91, C. 49, Sec. 2; C. L. '97, Sec. 3215."

[Endorsed]: No. 1010 Civil. IN THE District Court of the United States In and for the Southern District of California SOUTHERN DIVISION O. J. NICHOLS, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant DEMURRER. Received copy

of the within this 19th day of Aug 1921 M K Young & L L Young Attorneys for Plff FILED AUG 19 1921 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk E. W. CAMP PAUL BURKS U. T. CLOTFELTER M. W. REED ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION.

---ooo---

O. J. NICHOLS,
Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

NOTICE.

To the defendant above named, and to E. W. Camp, Paul Burks and Robert Brennan, its attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the above named plaintiff will, on the 12th day of September, 1921, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter

as counsel can be heard, move the above entitled court, in the department of the Honorable Oscar A. Trippett, for submission of and argument on the defendant's demurrer to the complaint in the above entitled action, and for the decision of the Court thereon.

Dated: August 29, 1921.

Young & Young
Attorneys for Plaintiff.
By Milton K Young

[Endorsed]: # 1010 Civil Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant Received copy of the within Notice this 29 day of August, 1921 E. W. Camp Atttorney for Defendant. NOTICE. FILED AUG. 30 1921 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff.

At a stated term, to-wit: the July A. D. 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the nineteenth

day of September, in the year of our Lord one thousand nine hundred and twenty one;

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

O. J. Nichols, Plaintiff,	)	
vs.	)	No. 1010 Civ. S. D.
A. T. & S. F. Ry. Co., a corp., Defendant.	)	

This cause coming on at this time for hearing on demurrer, M. K. Young, Esq., appearing as counsel for the plaintiff and Robert Brennen Esq., appearing as counsel for the defendant and said Robert Brennan, Esq., having argued in support of demurrer and M. K. Young, Esq., having argued in opposition thereto and Robert Brennan, Esq., having also argued in rebuttal, it is by the court ordered submitted; that defendant present brief in support of demurrer within ten days and plaintiff present brief in opposition thereto within five days thereafter.

At a stated term, to-wit: the July, A. D. 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof in the City of Los Angeles, on Tues-

day the sixth day of December, in the year of our Lord one thousand nine hundred and twenty-one; Present:

The Honorable Benjamin F. Bledsoe, District Judge.

O. J. Nichols, Plaintiff,)
)
vs.)
) No. 1010 Civ. S. D.
A. T. & S. F. R. R. Co.,)
Defendant.)

This cause coming on at this time EX PARTE and it appearing that this cause has heretofore been submitted on demurrer to complaint; now, good cause appearing therefor, it is by the court ordered that the demurrer to complaint be overruled and that defendant have ten (10) days within which to answer complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION.

O. J. NICHOLS,)
)
Plaintiff,) NO 1010 Civil.
)
vs.)
)
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,) ANSWER.
Defendant.)
)

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, the defendant in the

above entitled action, and for its answer to the complaint on file herein admits, denies and alleges as follows:

I.

That it admits the allegations of paragraphs I and II of said complaint.

II.

For answer to paragraph III of complaint it denies that at the time and place therein mentioned, or at any time or at any place or at all, or while the said Mary J. Nichols was in the vicinity of said or any dressing room in a railroad car of this defendant upon which the said Mary J. Nichols was riding, she was jerked or jarred with great or any force, or that because of any jerking or jarring of said or any car said Mary J. Nichols was thereby thrown from the train with great or any force or violence through the trap door or vestibule door or any other door of said car, and denies that both or either of the doors mentioned in said complaint for any time previously had been left open by the defendant. It denies that it was guilty of gross or any carelessness or negligence, either in the manner attempted to be alleged in said complaint or in any other manner or at all, and denies that any trap door or vestibule door of its cars of the train mentioned in said complaint was left open, or that this defendant was guilty of any carelessness or negligence with respect to said trap door or vestibule door or any other door upon said train. That it denies that said Mary J. Nichols because of any negligence

on its part was greatly hurt, bruised or injured by being thrown from said or any train or died from the effects of any injuries incurred because of any negligence of this defendant or of any of its agents, servants or employes.

That it denies that at the time or place mentioned in said complaint, and particularly in paragraph III thereof, or at any other time or at any place this defendant was guilty of any act of negligence causing or contributing to the injuries and death of said Mary J. Nichols.

III.

For answer to paragraph IV of complaint this defendant denies that the plaintiff has been damaged in the loss of the services of said Mary J. Nichols, or in the aid, advice and assistance which she was accustomed to render plaintiff in the conduct of his affairs or in the management of their home in the sum of Fifteen Thousand Dollars ($15,000.00) or any other sum or amount whatever, and in this connection alleges that under the laws of the State of New Mexico the items mentioned in paragraph IV of said complaint are not proper items of damage to be measured or awarded in an action of this character

IV.

For answer to paragraph V of the complaint defendant denies that under the laws of the State of New Mexico plaintiff as surviving husband of Mary J. Nichols, is entitled to recover for the loss of his

wife consortium or damages by reason of the loss of her society, love and affection, and denies that plaintiff has been damaged by reason of the loss of the society, love and affection of his said wife in the sum of Twenty Thousand Dollars ($20,000.00) or in any other sum or amount whatever.

V.

For answer to paragraph VI of the complaint it denies that plaintiff has been damaged by reason of the death of his wife as itemized and set forth in said paragraph, denies that plaintiff has sustained damage because of the items therein mentioned in the aggregate sum of Five Hundred Eighty Six Dollars and Forty-two cents ($586.42), or in any other sum or amount whatever, and denies that under the laws of the State of New Mexico said items or any of them are or is collectible as damages from this defendant.

It denies that plaintiff because of any negligence or carelessness on the part of this defendant has been damaged in the aggregate sum of Thirty Five Thousand Five Hundred Eighty Six Dollars and Forty two cents ($35,586.42), or in any other sum or amount whatever.

VI.

For its further answer to plaintiff's complaint and for a further and separate defense herein defendant alleges that if the said Mary J. Nichols was injured at the time or place or in the manner alleged in said complaint, or died as a result of such injuries, or if plaintiff sustained any loss or damage by reason of

such injuries and death, then such injuries and death and the damages resulting therefrom were caused solely by and resulted solely from the negligent acts and omissions of said Mary J. Nichols in leaving her proper place in the Pullman car in which she was riding on said train as a passenger and going to the platform or vestibule portion of said car and train, and that the plaintiff was also guilty of negligence in not giving proper care and attention to his said wife while enroute on defendant's train at the time and place mentioned in said complaint, by reason whereof the defendant alleges that the injuries to and death of said Mary J. Nichols and the damages resulting therefrom, if any there were, did not result from and were not caused by any negligent act or omission on the part of the defendant or any of its agents, servants or employes.

For a further and separate defense, defendant alleges that the injuries and death of Mary J. Nichols were caused by her own negligence and the negligence of the plaintiff as hereinbefore alleged, and that said negligence of Mary J. Nichols and the plaintiff was the direct and proximate cause of said accident, injuries and death.

VIII.

For further answer to said complaint and for a further and separate defense herein defendant alleges and shows to the Court that there is a defect of parties plaintiff in that the action is for damages for alleged wrongful death of Mary J. Nichols and such

an action under the laws of the State of New Mexico must be prosecuted by a personal representative of said Mary J. Nichols, deceased.

IX.

For further answer to said complaint and for a further and separate defense herein the defendant alleges that plaintiff's cause of action, if any he has, is barred by the provisions of Section 1822 of the 1915 New Mexico Statutes Annotated.

WHEREFORE defendant prays that plaintiff take nothing by his said action and that it be dismissed hence with judgment for its costs in this behalf incurred.

E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Defendant.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

W. H. Brewer, being by me first duly sworn, says that he is an officer, namely: the Assistant to the General Manager of The Atchison, Topeka and Santa Fe Railway Company named in the foregoing Answer, that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on in-

formation or belief, and that as to those matters he believes it to be true.

W. H. Brewer

Subscribed and sworn to before me
this 15th day of December, 1921.
(Seal) C. N. Stedman

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1010 Civil. IN THE District Court of the United States In and for the Southern District of California SOUTHERN DIVISION O. J. NICHOLS, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant ANSWER. Received copy of the within answer this 16 day of December 1921 Young & Young F. Bunker Attorney for Plaintiff FILED DEC 16 1921 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk E. W. CAMP PAUL BURKS ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
(Southern Division)

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. AMENDMENT TO COMPLAINT.

Leave of court being first had and obtained, plaintiff files this, his amendment to the complaint herein, as follows, to-wit:

Plaintiff adds a new paragraph to said complaint, to be known as paragraph IV thereof, after line 28 page 2 thereof, and alleges as follows, to-wit:

IV.

That said Mary J. Nichols left surviving her no minor children; that the plaintiff is the surviving husband of said Mary J. Nichols.

YOUNG & YOUNG,
By Milton K Young

STATE OF CALIFORNIA,)
County of Los Angeles,) SS.

O. J. Nichols being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has heard read the foregoing Amendment to the Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

O. J. Nichols,

Subscribed and Sworn to before me
this 11th day of April, 1922.
(SEAL) Chas. N. Williams,
Clerk U. S. District Court Southern District of California.

By Edmund L Smith Deputy

[Endorsed]: No. 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RY CO., a corporation. Defendant AMENDMENT TO COMPLAINT. FILED APR 11 1922 Chas. N. Williams, Clerk Louis J. Somers Deputy MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(Southern Division)

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.

No. Civil 1010

STIPULATION

(Waiving Jury Trial)

IT IS HEREBY STIPULATED AND AGREED between the parties to the above entitled action that a jury trial therein is hereby expressly waived to the end that said trial may be had before the court without a jury.

Dated, April 10th, 1922.

YOUNG & YOUNG
By Milton K. Young
Attorneys for Plaintiff.
E. W. Camp
Paul Burks
Robert Brennan
Attorneys for Defendant.

IT IS SO ORDERED, April 1922.

Trippet
Judge.

[Endorsed]: No. 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant. STIPULATION (Waiving Jury Trial) FILED APR 11 1922 CHAS. N. WILLIAMS Clerk Louis J. Somers Deputy MILTON K. YOUNG LYNDOL L. YOUNG 514 Pac. Mutual Bldg., Phone 60318 Los Angeles: Cal. Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. REQUEST FOR FINDINGS OF FACT.

NOW COMES the defendant, and not waiving either its motion to dismiss this action, or its motion for judgment in its favor and hereby requests this

Honorable Court to make the following findings of fact herein:

FIRST: That the defendant's train on which Mary J. Nichols, plaintiff's decedent, was a passenger, was not involved in any collision, derailment or other accident.

SECOND: That Mary J. Nichols, plaintiff's decedent did not suffer injury or death as a result of any derailment, collision, or other accident to the train in or on which she was traveling in the course of her journey, as a passenger.

THIRD: That Mary J. Nichols, plaintiff's decedent, did not die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any agent, officer, servant or employe of defendant while running, operating, conducting or managing any locomotive, car or train of cars, nor did the said Mary J. Nichols, while a passenger on defendant's train described in the evidence, die from any injury resulting from or occasioned by any defect or insufficiency in defendant's railroad or any part thereof, or in any locomotive or car operated by defendant.

FOURTH: That Mary J. Nichols, plaintiff's decedent, left her position in the car described in the evidence without reasonable cause and passed carelessly therefrom to the front platform and vestibule of such car, while the train was in motion, and the injury and death of Mary J. Nichols happened in conse-

quence of her so leaving the car and so passing carelessly from said car to the platform and vestibule thereof.

FIFTH: That Mary J. Nichols, plaintiff's decedent, left the inside of the car described in the evidence without reasonable cause and imprudently and negligently exposed herself to danger by passing to the platform and vestibuled portion of such car while the train was in motion.

E. W. Camp
Paul Burks
Robert Brennan
Attorneys for Defendant.

[Endorsed]: No. 1010 Civil. IN THE DISTRICT COURT of the United States In and for the Southern District of California Southern Division O. J. Nichols, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation. Defendant REQUEST FOR FINDINGS OF FACT. Received copy of the within Request for Findings, this 22 day of Mav 1922 Young and Young Attorney for Plaintiff. FILED MAY 23 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk E. W. Camp Paul Burks Robert Brennan Kerckhoff Building Los Angeles, California Telephone: Main 2980 Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
(Southern Division)

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

No. 1010 Civil.

REQUEST FOR FINDINGS OF FACT.

Comes now the plaintiff, O. J. Nichols, and hereby requests that this Honorable Court make the following Findings of Fact herein:

I.

That Mary J. Nichols at all times mentioned in the complaint was the wife of plaintiff O. J. Nichcols. That said Mary J. Nichols, while a passenger on a train of defendant, Atchison, Topeka & Santa Fe Railway Company, a corporation, on the 22nd day of June, 1920, in the State of New Mexico, at a point several miles westerly from the city of Las Vegas, in said state, was thrown from said train while said train was moving at a speed of about twenty-five (25) miles per hour, through the then open trap door and vestibule door of the car in which she was riding and thereby received injuries from which she died on the 1st day of July 1920.

That said Mary J. Nichols was so thrown from said train and came to her death by reason of the careless and negligent operation of said train by the defendant's agents, servants and employes, in leaving said trap door and vestibule door open and by reason of the jerking and jarring of said train.

II.

That plaintiff is entitled to recover judgment for the death of said Mary J. Nichols against defendant company, as the surviving husband of said Mary J. Nichols, Deceased, in the sum of $..... (amount to be fixed by the court).

YOUNG and YOUNG
By Milton K Young

[Endorsed]: No. 1010 Civil. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant. Received copy of the within Request for Findings of Fact, this 26th day of May, 1922 Robert Brennan C Attorney for Defendant FILED MAY 26 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk. MILTON K. YOUNG LYNDOL L. YOUNG 514 Pac. Mutual Bldg., Phone 60318 Los Angeles: Cal. Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A corporation, Defendant.	No. 1010 CIVIL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

This case having come on regularly for trial before the Court without the intervention of a jury; The Jury having been waived by the parties by stipulation filed with the Clerk of the Court, and the Court having heard the evidence and the arguments of counsel and having duly considered the case, finds:

First. That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;

Second. That the amount of damages sustained by the plaintiff is the sum of $5,000.00.

Third. That the allegations of the answer of the defendant are not true.

CONCLUSIONS OF LAW.

The defendant is entitled to judgment that the plaintiff take nothing by this action and for costs.

Let the Clerk enter Judgment accordingly.

Dated 1 day of Jun 1922.

Trippet

Judge.

[Endorsed]: No. 1010 Civil U. S. District Court, Southern District of California. O. J. Nichols, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation. FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED JUN 1 - 1922 at — min past — o'clock — M CHAS. N. WILLIAMS, Clerk Louis J. Somers Deputy

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UNITED STATES OF AMERICA DISTRICT COURT OF THE UNITED STATES SOUTHERN DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. 1010 Civil

This cause coming on regularly for trial on a day in the January, 1922, term of this Court before the

Court without the intervention of a jury, the jury having been expressly waived by the parties by stipulation filed with the Clerk; Milton K. Young and Lyndal L. Young, Esquires, appearing as Counsel for the plaintiff, and Robert Brennan, Esquire, appearing as Counsel for the defendant, and evidence having been introduced by both parties and received, and the cause and questions of law involved therein having been argued and submitted to the Court for its decision, and the Court being fully advised in the premises, having made its findings of fact and conclusions of law, and the same having been filed, -- Now, Therefore, in accordance with said conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, O. J. Nichols, take nothing by this his action, and that the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, go hereof without day, with its costs, taxed at $67.20.

JUDGMENT ENTERED June 6th, 1922.

CHAS. N. WILLIAMS, Clerk,
By Louis J. Somers
Deputy Clerk.

[Endorsed]: # 1010 Civil O. J. Nichols vs A T & S F Ry Co Judgment FILED JUN 6 - 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith, Deputy

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

No. 1010 Civil.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original JUDGMENT entered in the above-entitled action, and recorded in JUDGMENT BOOK NO. 3 for the SOUTHERN DIVISION, at Page 87 thereof; and I do further certify that the papers hereto annexed, constitute the JUDGMENT ROLL in said action.

ATTEST my hand and the seal of said District Court, this 15 day of June A. D., 1922.

CHAS. N. WILLIAMS, Clerk,
By Louis J. Somers
Deputy Clerk.

[Endorsed]: No. 1010 Civil. In the District Court OF THE UNITED STATES FOR THE

Southern District of California Southern Division. O. J. Nichols, vs. A. T. & S. F. Ry. Co., a corp. -- JUDGMENT ROLL -- Filed June 15 1922 Chas. N. Williams Clerk By Louis J. Somers Deputy Clerk Recorded Judgm't Book No. 3 Page 87

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, - vs - ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. ASSIGNMENT OF ERRORS.

Now comes the above named plaintiff in error, by Milton K. Young and Lyndol L. Young, his attorneys, and files the following assignment of errors, upon which he will rely for the prosecution of the Writ of Error in the above entitled cause, petition for which Writ of Error is filed at the same time as this Assignment of Errors.

1. The Court erred in its conclusion of law wherein it concludes and decides that the defendant is en-

titled to judgment, and that the plaintiff take nothing by this action.

2. The Court erred in its conclusion of law wherein it concludes and decides that the defendant is entitled to judgment for its costs in this action.

3. The Court erred in ordering the clerk to enter judgment against the plaintiff and in favor of the defendant in accordance with the said conclusions of law.

7. The Court erred in rendering and entering judgment herein in favor of the defendant and against the plaintiff.

WHEREFORE, the plaintiff prays that the judgment of said Court be in all things reversed.

Milton K Young
and
Lyndol L Young
Counsel for Plaintiff in Error.

[Endorsed]: 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division. O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy ASSIGNMENT OF ERRORS. MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. 1010 Civil. PETITION FOR WRIT OF ERROR.

O. J. Nichols, plaintiff in the above entitled case, feeling himself aggrieved by the judgment entered on the 6th day of June, 1922, in the above entitled cause, comes now, by Milton K. Young and Lyndol L. Young, his attorneys, and files herewith his assignment of errors, and petitions said court for an order allowing said plaintiff to procure a writ of error to the Honorable, The Circuit Court of Appeals of the United States, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

AND ALSO that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated,

may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit.

Milton K Young
and
Lyndol L Young
Attorneys for Plaintiff in Error.

[Endorsed]: 1010 Civ. IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk PETITION FOR WRIT OF ERROR. MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Company Phone 14236 Los Angeles: Cal. Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No.1010 Civil. ORDER

Upon Motion of Milton K. Young and Lyndol L. Young, attorneys for plaintiff, and upon filing a peti-

tion for a Writ of Error and Assignment of Errors, IT IS ORDERED, that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the Judgment heretofore entered herein.

IT IS FURTHER ORDERED, that the plaintiff in error file a good and sufficient bond in the penal sum of $250.00 that he will prosecute his writ of error to effect, and that if he fails to make his plea good, that he shall answer all costs herein.

DATED: 15th June, 1922.

Trippet
JUDGE

[Endorsed]: 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk ORDER FOR WRIT OF ERROR MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff.

(Cut.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

(Southern Division.)

—oOo—

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. COST BOND.

—oOo—

KNOW ALL MEN BY THESE PRESENTS that the undersigned, National Surety Company, a corporation, duly organized and existing under the laws of the State of New York, duly authorized to transact business within the State of California, as surety, is held and firmly bound unto Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant above named, in the sum of two hundred fifty dollars ($250.00) lawful money of the United States, to be paid to it or its successors, to which payment well and truly to be made, we bind ourselves and our successors by these presents.

WHEREAS lately at the January term of the above Court, in a suit depending in said Court between O.

J. Nichols, plaintiff, and Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, judgment was rendered against said plaintiff, and the said plaintiff having obtained a Writ of Error of the said Court to reverse the judgment in the aforesaid suit, and a Citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the 9th Circuit, at the City and County of San Francisco, within 30 days from and after the date of said Citation.

Now the condition of the above obligation is such that if said plaintiff shall prosecute said Writ of Error to effect and answer all damages and costs, if plaintiff fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and virtue

IN WITNESS WHEREOF, the Surety has caused this Bond to be executed by its duly authorized officers, and its seal duly affixed.

NATIONAL SURETY COMPANY,
By Catesby C. Thom
Its Attorney - in - Fact.

(Seal)

I hereby approve the foregoing bond. Dated the 28 day of June 1922

Trippet
Judge

Examined and recommended for approval as provided in Rule 29

Milton K Young
ATTORNEY.

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles)

On this 27th day of June in the year one thousand nine hundred and 22, before me Myrtle E. Dittman, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of NATIONAL SURETY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and said Catesby C. Thom, acknowledged to me that he subscribed the name of NATIONAL SURETY COMPANY thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in the Certificate first above written.

Myrtle E Dittman,
Notary Public in and for Los Angeles County, State of California.

(Seal) [ATTORNEY IN FACT]

[Endorsed]: No. 1010 Civ. U. S. DISTRICT COURT Southern District of California. O. J. Nichols v A T & S F Ry Co, Bond on Appeal FILED JUN 28 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

O. J. NICHOLS,	)	Clerk's Office
	)	
- vs -	)	
	)	No. 1010 Civil.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,	)	PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue and prepare a transcript for the plaintiff in error upon the Writ of Error in the Circuit Court of Appeals of the Ninth Judicial Circuit of the record in the above entitled case, and include therein the plaintiff's complaint and the amendment thereto, the summons, the defendant's demurrer, the defendant's answer, the Court's Findings and conclusions of law, and the judgment thereon, the judgment roll, the petition for Writ of Error, Assignment of Errors, Order allowing the Writ of Error, the Writ of Error, the Citation, the bond and the certificate of the clerk authenticating the record.

Milton K Yonng
and
Lyndol L Young
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1010 Civil U. S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFOR-

NIA O. J. NICHOLS, Plaintiff in Error, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in Error. PRAECIPE for Preparing the Record. FILED JUN 15 1922. CHAS. N. WILLIAMS, Clerk. By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS,	)	
Plaintiff,	)	
vs.	)	
ATCHISON, TOPEKA &	)	CLERK'S
	)	CERTIFICATE.
SANTA FE RAILWAY COMPANY, a corporation,	)	
Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 62 pages, numbered from 1 to 62 inclusive, to be the Transcript of Record on Writ of Error in the above-entitled cause, as printed by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, judgment roll, assignment of errors, petition for writ of error, order, cost bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to $18.65 and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 3d day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Seal]

By R. S. Zimmerman,
Deputy.

Due service of the within, and receipt of 3 copies hereof, is hereby admitted this 5th day of August, A. D. 1922.

GEO. CAMP,
ROBERT BRENNAN,
PAUL BURKS,
Attorneys for Defendant in Error.

[Endorsed]: Printed Transcript of Record. Filed August 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3908

United States
Circuit Court of Appeals
For the Ninth Circuit.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order of Submission.

ORDERED above-entitled cause argued by Mr. Milton K. Young, counsel for the plaintiff in error, and by Mr. Robert Brennan, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES AND JUDGMENTS.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed, and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * O. J. Nichols, Plaintiff in Error, vs. Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendant in Error. No. 3908. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division.

Before GILBERT, ROSS and HUNT, Circuit Judges.

ROSS, Circuit Judge:

June 20, 1920, the plaintiff in error and his wife, Mary J. Nichols, took passage on one of the vestibuled trains of the defendant in error at Fall Brook, San Diego County, California, for the city of Chicago, paying the railway company its established fare for such transportation. Near the city of Las Vegas, in the state of New Mexico, Mrs. Nichols was thrown by a sudden jerk or jar of the car in which she was, through a door, which had been negligently left open, with such force as to cause her injuries which resulted in her death in Las Vegas July first. The plaintiff in error thereupon brought this action in one of the Superior Courts of

the State of California for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00, and further damaged in the sum of $586.42 for various specified expenses.

The defendant to the action (which is a Kansas corporation) asked for its removal to the court below on the sole ground of diverse citizenship, which petition was granted and the case there came on for trial before the Court, a jury having been waived by stipulation of the respective parties. The trial resulted in these findings of fact:

> "First. That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;
>
> Second. That the amount of damages sustained by the plaintiff is the sum of $5,000.00.
>
> Third. That the allegations of the answer of the defendant are not true."

And as a conclusion of law the Court found the defendant entitled to judgment that the plaintiff take nothing by the action and for costs.

A Judgment to that effect was entered.

The law of the case, as we understand it, is this: The defendant in error, having removed the action from the court of the state in which it was brought on the sole ground of diversity of citizenship, this Court must hold the case governed by the rule that would have controlled it had it not been so removed. It was so held in effect by this Court in the case of

Northern Pacific Railway Co. vs. Kempton, 138 Fed. 992, 998, 999. See also Spokane Inland R. R. vs. Whitley, 237 U. S. 487, and cases there cited.

It is not contended that the cause of action of the plaintiff in error was given by the common law, but by a statute, of the state where the accident to and the death of his wife occurred, which statute reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of Five Thousand Dollars, which may be sued for and recovered, First, by the husband or wife of the deceased,

or, Second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deecased; or, Third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then by the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency." Sec. 1820, Annotated Statutes 1915; Sec. 2308, Compiled Laws of 1884 of New Mexico.

No Court would, we think, be justified in holding that that statute would have been enacted by the legislature of the state of New Mexico without the limitation of the amount of damages thereby fixed, which limitation is, therefore, as much a part of the law creating the liability as any other part of it. The defendant in error contends—and such was evidently the theory upon which the judgment of the Court below was rested—that the policy of the above statute is so opposed to the policy of the State of California that no Court of that state would enforce it. If the statute can be properly held to be a penal one, that is undoubtedly true. It was said by the Supreme Court, speaking through Chief Justice Marshall in *The Antelope,* 10 Wheat. 66, 123: "The Courts of no country execute the penal laws of another." No more do the Courts of any state of the

United States execute the penal laws of another state. Huntington vs. Attrill, 146 U. S. 657.

But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law. Huntington vs. Attrill, *supra;* Dennick vs. Railroad Co., 103 U. S. 11; Texas & Pacific Railway vs. Cox, 145 U. S. 593.

In Huntington vs. Attrill the Supreme Court said at pages 673 et seq. 146 U. S.:

> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick vs. Railroad Co., 103 U. S. 11.
>
> "In that case, it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the

neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a Circuit Court of the United States held in the State of New York by an administrator of the deceased, appointed in that State.

"Mr. Justice Miller, in delivering judgment, said: 'It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdic-

tion of such matters and can obtain jurisdiction of the parties.' 103 U. S. 17, 18.

"That decision is important as establishing two points: 1st. The Court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in Texas & Pacific Railway vs. Cox, 145 U. S. 593, 605, where the Chief Justice, speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: 'The question, however, is one of general law, and we regard it as settled in Dennick vs. Railroad Co.'

"That decision has been also followed in the courts of several States. Herrick vs. Minneapolis & St. Louis Railway, 31 Minnesota, 11; Chicago etc. Railroad vs. Doyle, 60 Mississippi, 977; Knight vs. West Jersey Railroad, 108 Penn. St. 250; Morris vs. Chicago etc. Railway, 65 Iowa, 727; Missouri Pacific Railway vs.

Lewis, 24 Nebraska, 848; Higgins vs. Central New England Railroad, 155 Mass. 176.

"In the case last cited, a statute of Connecticut having provided that all actions for injuries to the person, including those resulting instantaneously or otherwise in death, should survive; and that for an injury resulting in death from negligence the executor or administrator of the deceased might maintain an action to recover damages not exceeding $5,000, to be distributed among his widow and heirs in certain proportions; it was held that such an action was not a penal action, and might be maintained under that statute in Massachusetts by an administrator, appointed there, of a citizen thereof, who had been instantly killed in Connecticut by the negligence of a railroad corporation; and the general principles applicable to the case were carefully stated as follows: 'These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not juris-

diction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction.' 155 Mass. 180."

Nothing further, we think, need be said to show that the judgment of the Court below in the present case must be reversed with directions to it to enter judgment in favor of the plaintiff for $5,000 with costs in both courts.

It is so ordered.

[Endorsed]: Opinion. Filed January 22, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiff in error and against the defendant in error, and that this cause be and hereby is remanded to the said District Court, with directions to enter judgment in favor of the plaintiff for $5,000, with costs in both courts.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defendant in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered January 22, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable FRANK H. RUDKIN, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order Denying Petition for Rehearing.

On consideration of the petition of defendant in error for a rehearing filed February 20, 1923, and of the answer of plaintiff in error to said petition, filed February 26, 1923, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is ORDERED that the petition for rehearing in the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order Staying Issuance of Mandate, Etc.

Pursuant to telegraphic request of counsel for the defendant in error, and good cause appearing therefor, ORDERED mandate in the above-entitled cause stayed for a period of thirty (30) days, and provided a Petition for Writ of Certiorari be docketed and submitted to said Supreme Court agreeably to subdivision 4 of rule 37 of the said Supreme Court, within said period, and in that event said mandate be further stayed until after the determination of said Petition.

Dated: San Francisco, California, March 2, 1923.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed March 2, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-eight (78) pages, numbered from and including 1 to and including 78, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the defendant in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of March, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

WRIT OF CERTIORARI AND RETURN—Filed July 25, 1923

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which O. J. Nichols is plaintiff in error, and Atchison, Topeka and Santa Fe Railway Company is defendant in error, No. 3908, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

STIPULATION

(Of Counsel Relative to Return to Writ of Certiorari)

Whereas, the Supreme Court of the United States has heretofore granted the Petition of the Defendant in Error for a Writ of Certiorari to review the Record in the above cause, and under date of June 23, 1923, issued its Writ of Certiorari directing the above court to send to it the record of the proceedings in the above cause, a certified copy of which said record and proceedings have heretofore been lodged in said Court by the Defendant in Error.

Now, therefore, it is hereby stipulated by and between the parties to the above entitled action, that the Certified Copy of the Record

in the above entitled action heretofore filed in the Supreme Court of the United States by the Defendant in Error as a part of its petition for a Writ of Certiorari, may be taken as the Return to the Writ of Certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, [fol. 85] a Certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his Return to the Writ of Certiorari issued out of the Supreme Court of the United States on the 23rd day of June, 1923.

Dated July 7, 1923.

Milton K. Young, L. L. Young, Wm. K. Young, Attorneys for Plaintiff in Error. Gardiner Lathrop, E. W. Camp, Robert Brennan, Attorneys for Defendant in Error.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed July 11, 1923. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 3908

O. J. NICHOLS, Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPULATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding pages to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 11th day of July, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 3908

O. J. NICHOLS, Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant in Error.

RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record heretofore filed by the defendant in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 11th day of July, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[File endorsement omitted.]

Office Supreme Court,
FILED
MAR 31 192
WM. R. STANSB
CL

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. ~~958~~ 764

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

PETITION FOR CERTIORARI.

E. W. CAMP,
PAUL BURKS,
ROBERT BRENNAN,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, 241 New High St., Los Angeles.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Cicuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Petition for Certiorari.

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit reversing a judgment in favor of your petitioner in the case of O. J. Nichols v.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, and carried to said Circuit Court of Appeals by writ of error, and respectfully shows to this court as follows:

Statement of the Case.

I.

Your petitioner was, at the time of the commencement of the action hereinafter specified, and still is, a corporation, a citizen and resident of the state of Kansas, and was at said time and still is a common carrier engaged in interstate commerce by railway and between the states respectively, among others, of Illinois, Missouri, Kansas, Colorado, New Mexico, Arizona and California, operating regular passenger trains for the transportation of persons for hire.

II.

In June, 1920, Mary J. Nichols was a passenger on one of petitioner's said trains en route from Fallbrook, California, to Chicago, Illinois, and when passing through the state of New Mexico she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

III.

In June, 1921, O. J. Nichols, the surviving spouse of said deceased, in his individual capacity, brought an action against your petitioner in the Superior Court of the state of California, in and for the county of Los Angeles, for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00, and further damaged in the amount of $586.42 for expenses incident to the last illness and burial of his wife, for railroad fare and various other specified expenses.

Your petitioner, the defendant in said action, within the time allowed by law, asked for and secured the removal of said action into the United States District Court for the Southern District of California, Southern Division, on the ground of diverse citizenship, where the case was tried before the court, without the intervention of a jury, a jury having been waived by written stipulation of the respective parties. The trial resulted in these findings of fact:

"First: That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;

Second: That the amount of damages sustained by the plaintiff is the sum of $5,000.00;

Third: That the allegations of the answer of the defendant are not true."

And as a conclusion of law, the court found that your petitioner, the defendant in said action, was entitled to judgment and a judgment to that effect was entered.

The case was carried by the plaintiff in error to the United States Circuit Court of Appeals for the Ninth Circuit by writ of error.

The assignment of error raised but one question, to-wit: Whether judgment should have been entered for your petitioner, the defendant in error therein, or should have been entered for the plaintiff in error for $5,000.00.

IV.

During all of the times herein mentioned, the only recovery allowed by the laws of New Mexico for the death of a passenger on a railroad train resulting from or occasioned by negligent operation or by any defect or insufficiency in any railroad or any part thereof or in any locomotive was and is that given by section 1820 of the New Mexico Annotated Statutes, 1915; that statute is also contained in the Compiled Laws of New Mexico of 1884 as section 2308, and in the Compiled Laws of a later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars,

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Cicuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Petition for Certiorari.

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit reversing a judgment in favor of your petitioner in the case of O. J. Nichols v.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, and carried to said Circuit Court of Appeals by writ of error, and respectfully shows to this court as follows:

Statement of the Case.

I.

Your petitioner was, at the time of the commencement of the action hereinafter specified, and still is, a corporation, a citizen and resident of the state of Kansas, and was at said time and still is a common carrier engaged in interstate commerce by railway and between the states respectively, among others, of Illinois, Missouri, Kansas, Colorado, New Mexico, Arizona and California, operating regular passenger trains for the transportation of persons for hire.

II.

In June, 1920, Mary J. Nichols was a passenger on one of petitioner's said trains en route from Fallbrook, California, to Chicago, Illinois, and when passing through the state of New Mexico she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

III.

In June, 1921, O. J. Nichols, the surviving spouse of said deceased, in his individual capacity, brought an action against your petitioner in the Superior Court of the state of California, in and for the county of Los Angeles, for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00, and further damaged in the amount of $586.42 for expenses incident to the last illness and burial of his wife, for railroad fare and various other specified expenses.

Your petitioner, the defendant in said action, within the time allowed by law, asked for and secured the removal of said action into the United States District Court for the Southern District of California, Southern Division, on the ground of diverse citizenship, where the case was tried before the court, without the intervention of a jury, a jury having been waived by written stipulation of the respective parties. The trial resulted in these findings of fact:

"First: That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;

Second: That the amount of damages sustained by the plaintiff is the sum of $5,000.00;

Third: That the allegations of the answer of the defendant are not true."

And as a conclusion of law, the court found that your petitioner, the defendant in said action, was entitled to judgment and a judgment to that effect was entered.

The case was carried by the plaintiff in error to the United States Circuit Court of Appeals for the Ninth Circuit by writ of error.

The assignment of error raised but one question, to-wit: Whether judgment should have been entered for your petitioner, the defendant in error therein, or should have been entered for the plaintiff in error for $5,000.00.

IV.

During all of the times herein mentioned, the only recovery allowed by the laws of New Mexico for the death of a passenger on a railroad train resulting from or occasioned by negligent operation or by any defect or insufficiency in any railroad or any part thereof or in any locomotive was and is that given by section 1820 of the New Mexico Annotated Statutes, 1915; that statute is also contained in the Compiled Laws of New Mexico of 1884 as section 2308, and in the Compiled Laws of a later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars,

or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

V.

That thereafter, to-wit, on the 22nd of January, 1923, the said Circuit Court of Appeals rendered and filed an opinion written by His

Honor Judge Ross, reversing the judgment before it for review, and directing a judgment to be entered in said United States District Court for the Southern District of California in favor of said O. J. Nichols, the plaintiff in error, for $5000.00; the said Circuit Court of Appeals in its said decision and opinion holding in effect, in accordance with the contention of your petitioner, as the basic rule of law applicable in the case, that it was governed by the rule that would have controlled had the cause not been removed into the federal court.

The said Circuit Court of Appeals in its said decision and opinion, in accordance with your petitioner's contention, further held in effect that the only recovery allowed by the laws of New Mexico for the death of the said Mary J. Nichols was that given by said section 1820 of the New Mexico Annotated Statutes, 1915 edition. But that said statute, according to the decision and opinion of said Circuit Court of Appeals, was not penal in character and would therefore be enforced and administered in the court of California and in the federal court sitting in that state, notwithstanding the contention of your petitioner that said New Mexico statute declared a policy of law inconsistent with the policy of the state of California in which the suit was brought, and was so opposed to the policy of California that no court

of that state would enforce it; and your petitioner respectfully submits that to determine the New Mexico statute non-penal is not an answer to the question whether a recovery thereunder would be permitted in the state court of California. The said Circuit Court of Appeals rested its decision and opinion on the authority of Huntington v. Attrill, 146 U. S. 657.

VI.

Before and since the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery, and in every instance where made the basis of an action in another state either before or since the case of Huntington v. Attrill, recovery has been refused.

In the case of Marshall v. Ry. Co., 46 Fed. 269, the Missouri statute, like the one in question, had been attempted to be used as a basis of recovery in the federal court in Ohio. In considering the statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and recovery is to to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal."

Judge Sage makes this very pertinent suggestion:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitrary, inflexible rule would be in conflict with the constitutional right of the defendant to a jury trial."

Since the decision of Huntington against Attrill, the state courts of Texas, Kansas, Iowa and Illinois have refused a recovery thereunder:

Clay v. Ry. (Tex.), 228 S. W. 907;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;
Matheson v. Ry. Co., 61 Kan. 667, 60th Pac. 747;
Armbruster v. Ry. Co., 166 Ia. 155, 147 N. W. 337;
Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

A similar case is:

Christilly v. Warner, 87 Conn. 461, 88 Atl. 711.

That this Honorable Court has approved and adopted, if not encouraged the refusal of state

courts to entertain actions on foreign statutes, not harmonizing with the policy of the forum, is reflected in the case of Slater v. Mexican National Ry. Co., 194 U. S. 120.

In Mo. Pac. v. Ault, 256 U. S. 554, there came before this Honorable Court a suit to recover wages under a statute of Arkansas, providing that if a railroad company should discharge an employee it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employee should continue at the same rate until paid. In the lower court Ault recovered $50.00, his wages up to the time of his discharge, and $390.00 wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of punishment; that the Supreme Court of Arkansas had held that it is not technically a penalty, but was allowed for a double purpose, namely, as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

Hence it was held that the judgment against the director general of railroads, insofar as it provided for the recovery of the penalty, was erroneous.

Your petitioner therefore shows unto this Honorable Court that there is a conflict of decision and opinion among the lower federal courts and particularly is there an irreconcilable conflict between the decision and opinion of the Honorable Circuit Court of Appeals for the Ninth Circuit, here sought to be reviewed, and the decision and opinion of the United States District Court in the case of Marshall v. Wabash, 46 Fed. 269, and the further irreconcilable conflict of decision and opinion between the said Circuit Court of Appeals and the Supreme Court of the states of Texas, Kansas, Iowa and Illinois, respectively; and the decision and opinion of said Circuit Court of Appeals is irreconcilable with the case of Gallagher v. Ry., United States District Court, Southern District, N. Y., 196 Fed. 1000, in which Judge Mayer refused to enforce or administer a statute of Florida in an action in a federal court in New York, because contrary to the spirit and policy of the laws of the forum.

The decision and opinion of the said Circuit Court of Appeals, it is submitted, is irreconcilable with the decisions and opinions of said federal and state courts, particularly since the Supreme Court of Missouri in construing the statute of that state, from which the New Mexico statute was copied, held in the case of Grier v. Ry. Co., 228 S. W. 454, that the statute was

penal, as also to the same effect is the decision of the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne, 244 S. W. 369, wherein it was held that there could be no recovery against the director general of railroads under the Missouri statute for the death of a traveler on a highway crossed by a railroad because of any neglect in the operation of the train which killed the traveler, since such statute is properly penal and in no sense compensatory.

Your petitioner further shows to this Honorable Court that the United States Circuit Court of Appeals for the Eighth Circuit had before it the case of Hopper v. Denver etc. R. Co., reported in 155 Federal at page 273. There the plaintiff sued to recover from the railroad company damages for the death of his daughter, under a Colorado statute which created an action for death negligently caused by a public carrier and which statute declared that every such public carrier should forfeit for every person and passenger so injured or killed not more than $5000.00, nor less than $3000.00.

Justice Van Devanter, who delivered the opinion of the court, not only left open for further consideration the question of the validity of such a statute, but also passed for further consideration the question as to whether the statute, if valid, could be enforced outside of the state court of Colorado. In other words,

Justice Van Devanter left open the question as to whether the Colorado statute could be enforced or administered in a federal court sitting in Colorado, with this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 246, 57 Am. Rep. 382; Marshall v. Wabash R. Co. (C. C.), 46 Fed. 269; Dale v. Atchison etc. Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City etc. Co., 61 Kan. 667, 60 Pac. 747; Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Brady v. Daly, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; Boston & Maine R. R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; McCabe v. American Woolen Co. (C. C.), 124 Fed. 283; s. c. 65 C. C. A. 59, 132 Fed. 1006; Malloy v. American Hide & Leather Co. (C. C.), 148 Fed. 482; Wharton's Conflict of Laws (3d Ed.), Secs. 4b, 480a; Atlanta v. Chattanooga Foundry, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L.

Ed. 241; Johnson v. Southern Pac. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363.)"

VII.

On the 16th day of February, 1923, and within the time prescribed by the rules of said Circuit Court of Appeals, your petitioner filed with the clerk of said court its petition for a rehearing in said entitled cause, which said petition was on the 26th day of February, 1923, denied.

VIII.

On the 2nd day of March, 1923, upon the application of your petitioner, said Circuit Court of Appeals made an order in said cause, withholding the issuance of its mandate for a period of thirty days next after said date, to enable your petitioner to apply to this Honorable Court for a writ of *certiorari* to review said decision and opinion.

IX.

Your petitioner furnishes and submits herewith as an exhibit to this petition a certified copy of the entire transcript of record in the case, including the proceedings in said Circuit Court of Appeals for the Ninth Circuit, to which the writ of certiorari is asked to be directed herein.

X.

The questions and propositions of law involved herein are substantially as follows:

1. That the plaintiff in said suit of O. J. Nichols against your petitioner has no remedy except under section 1820 of the Laws of New Mexico, edition of 1915.

This is settled by the decision of the Supreme Court of New Mexico rendered in 1903 in the case of Romero v. Atchison etc. Company, 11 N. M. 679, 72 Pac. 37. The decision and opinion of the Circuit Court of Appeals in the instant case rests upon the same hypothesis.

2. Was the Circuit Court of Appeals correct in its decision and opinion that the New Mexico statute was not penal in character and would be enforced in a state court of California?

3. Conceding (but not admitting) the correctness of the premise that the New Mexico statute here involved is non-penal in character, still may the "new and extraordinary civil liability upon those causing death," created thereby, by subjecting common carriers alone to the payment of a forfeit of $5000.00 without regard to the pecuniary loss sustained, be enforced in a court of California, in view of the settled policy of that state that the amount of damages, when the death of a person is caused by wrongful act or neglect of another, shall be determined according to the evidence of pecuniary loss and

that they shall be strictly compensatory for the pecuniary loss as proved, particularly in view of section 377 of the Code of Civil Procedure of the state of California, which is a new action and not the action which the deceased might have brought for the wrong had he survived, applicable to all defendants alike? That code section reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

4. The District Court of Appeal of California in the case of McManus v. Red Salmon Canning Co., 37 Cal. App. 133, decided that an action for wrongful death is governed by the law of the jurisdiction where the *tort* was committed, is transitory, and may be maintained in any jurisdiction where the defendant is found, *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the general policy of the law of its own jurisdiction.*

In view of this decision it is submitted that the New Mexico statute here involved would not be enforced in a court in California because it is contrary to the policy of that state as defined by said section 377 of its Code of Civil Procedure and as expounded by its Supreme Court in the cases of:

Lange v. Schoettler, 115 Cal. 388;
Redfield v. Oakland Ry. Co., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765.

5. While the courts of California have not been asked to enforce this statute of New Mexico, the courts of other states, having the same policy that California has concerning the measure of damages, have repeatedly refused to allow a recovery under the New Mexico statute, or under the statute of Missouri from which the New Mexico statute was copied.

6. The Circuit Court of Appeals rests its decision and opinion on the theory that the instant case is ruled by the doctrine of the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The decision was based really upon a consideration

of the remedial purpose of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;
National Park Bank v. Remsen, 158 U. S. 337;
Chase v. Curtis, 11 U. S. 452.

XI.

Your petitioner further avers that the present case is one in which it is proper for this Honorable Court to issue a writ of *certiorari*, for the following reasons, among others:

1. Because, as indicated by said decisions, there is conflict between the Circuit Court of Appeals for the Ninth Circuit and said federal and state courts touching the true interpretation to be accorded to said New Mexico statute and as to whether it is susceptible of enforcement in a jurisdiction where such statute is contrary to the spirit and policy of the laws thereof.

2. Because it is the peculiar province of this Honorable Court to bring about uniformity of decision and to reconcile if possible the conflict in the decisions of the lower federal courts and to co-ordinate in harmonizing the law on the subject of the *lex fori* where statutes alleged to be in conflict therewith are sought to be enforced or administered.

3. Because the New Mexico statute involved herein has not been passed upon by this Honorable Court.

4. Because the decision and opinion of the Circuit Court of Appeals in this case, it is submitted, greatly enlarges the scope and unreasonably widens the influence of said case of Huntington v. Attrill in that it permits a foreign statute to be enforced or administered when non-penal in the international sense, although such foreign statute may be opposed to the *lex fori*.

5. Because the decision and opinion of the Circuit Court of Appeals stretches the doctrine of said case of Huntington v. Attrill to an unreasonable extent and would apply the doctrine of that case to the instant case as a justification for the enforcement in California of a New Mexico statute, notwithstanding such New Mexico statute is obviously opposed to the policy of California.

6. Because the public interests, and the interests of jurisprudence, require the decision of this Honorable Court upon the questions of law involved herein.

7. Because the question of the enforcement in California of the New Mexico statute here involved is of sufficient general and material importance and interest as to make it necessary that it should be examined by the court of last resort.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Ninth Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

E. W. CAMP,
PAUL BURKS,
ROBERT BRENNAN,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

Verification.

United States of America, Southern District of California, Southern Division, City of Los Angeles—ss.

W. H. Brewer, being first duly sworn, says:

That he is an officer, to-wit, assistant to the general manager of The Atchison, Topeka and Santa Fe Railway Company, petitioner in the above entitled action, and as such makes this affidavit for and on behalf of said petitioner; that he has read the foregoing petition and that

the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true; that his knowledge is derived from the record in said cause and from the statements of counsel for petitioner duly communicated to him.

W. H. BREWER.

Subscribed and sworn to before me this..... day of March, 1923.

(Seal) NELLIE B. KEMPER,
Notary Public in and for the County of Los Angeles, State of California.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion said petition is well founded and the case is one in which the prayer of the petition should be granted by this Honorable Court.

E. W. CAMP,
Counsel for Petitioner.

Office Supreme Court
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. ~~958~~ 765

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief in Support of Petition for Writ of Certiorari.

E. W. CAMP,
PAUL BURKS,
ROBERT BRENNAN,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, 241 East Fifth St., Los Angeles.

TOPICAL INDEX.

PAGE

Statement of the Case 5
Brief of the Argument 9
Argument 12
The Policy of Section 1820 of the Statutes of New Mexico Is Opposed to the Policy of the State of California and It Is Submitted That There Is Nothing in the Case of Huntington v. Attrill, 146 U. S. 657, That Is Authority for the Enforcement in California of Said Section of the New Mexico Statute 18

List of All Cases Referred To.

PAGE

Armbruster v. Ry. Co., 166 Ia. 155; 147 N. W. 337 ..... 12, 40
Arizona Statute, Section 1820 7
Bank v. Remsen, 158 U. S. 337 12
Barnes v. Alexander, 232 U. S. 117 10
Bird v. Hayden, 1 Roberts (N. Y.) 383 ..... 11, 22
Bond v. United Railroads, 159 Cal. 270 ..... 11, 24
Boston, Etc., R. v. Hurd, 108 Fed. 116 ..... 12, 39
Cal. Code of Civil Procedure, Section 377 27
Casey v. Ry. Co., 116 Mo. App. 235; 91 S. W. 419 ..... 12, 26
Chase v. Curtis, 113 U. S. 452 18
Christilly v. Warner, 87 Conn. 461; 88 Atl. 711 ..... 12, 35, 40
Clay v. Ry. Co., 228 S. W. 907 ..... 10, 12, 33, 40
Cox v. T. & P. Ry. Co., 145 U. S. 593 ..... 10, 26
Dale v. Atchison, 57 Kan. 601; 47 Pac. 521 ..... 11, 26, 32, 40
Derrickson v. Smith, 27 N. J. L. 166 ..... 11, 21
Finney v. Guy, 189 U. S. 335 ..... 11, 23
Gallagher v. Ry. Co., 196 Fed. 1000 10
Grier v. K. C. R. Co., 228 S. W. (Mo.) 454 ..... 11, 20
Hill v. Boston, Etc., R. Co., 77 N. H. 151, 89 Atl. 482 ..... 12, 39
Hopper v. Denver Etc., Ry. Co., 155 Fed. 273 ..... 10, 24

PAGE

Huntington v. Attrill, 146 U. S. 657.....12, 35
Ill. Cent. Ry. v. Ihlenberg, 75 Fed. 873..... 10
Ind., Etc. v. John, 5 Hammond (Ohio) 217..... 11
Kramer v. Ry. Co., 25 Cal. 434..... 10
Lange v. Schoettler, 115 Cal. 388.....11, 24, 27
Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852 .....11, 17
Marshall v. Ry. Co., 46 Fed. 269.....12, 26, 32, 40
Matheson v. Ry. Co., 61 Kan. 667; 60th Pac. 747 .....12, 34, 40
McClain v. Ins. Co., 110 Fed. 80..... 10
McManus v. Canning Co., 37 Cal. App. 133.....10, 13
Minor on Conflict of Law, Section 10..... 11
Mo. Pac. v. Ault, 256 U. S. 557.....12, 37
Moss v. Smith, 171 Cal. 777.....12, 36
National Park Bank v. Remsen, 158 U. S. 337.....18, 37
No. Pac. Ry. Co. v. Hambly, 154 U. S. 349..... 10
Parsons v. Easton, 184 Cal. 765.....11, 29
Patterson v. Thompson, 86 Fed. 85.....12, 18, 36
Phoenix R. R. Co. v. Landis, 231 U. S. 578..... 10
Pickering v. Fisk, 6 Vt. 102.....11, 22
Pryor v. Payne, 244 S. W. 369.....11, 21
Raisor v. R. R. Co., 215 Ill. 47; 74 N. E. 69..... .....12, 26, 30, 40
Redfield v. Ry. Co., 110 Cal. 277.....11, 29
Romero v. Ry. Co., 11 New Mexico 679; 72 Pac. 37 .....10, 12, 26
Ryan v. No. Alaska S. Co., 153 Cal. 438..... 10
Slater v. Mex. National Co., 194 U. S. 120.....12, 40
Spokane, Etc., v. Whitley, 237 U. S. 487..... 10
Story v. Green, 164 Cal. 768.....12, 40
St. L. Ry. Co. v. Seale, 229 U. S. 156..... 10
Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.....11, 17
Wilson v. Tootle, 55 Fed. 211..... 10

IN THE

SUPREME COURT

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UNITED STATES.

No.....

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error.

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief in Support of Petition for Writ of Certiorari.

Italics ours, unless otherwise indicated.

May It Please the Court:

The case which is here sought to have reviewed involves the enforcement in California, or in a Federal Court sitting in that state, of a statute of the state of New Mexico, copied from a statute of Missouri, which created a special action against public carriers alone in

favor of certain specified persons whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or trains of cars or of any driver of any stage coach or other public conveyance; and which statute declared that for every passenger dying from any injury resulting from or occasioned by any default or any insufficiency in any such railroad, locomotive, stage coach or other public conveyance, the corporation or public carrier should *forfeit and pay* for every such person and passenger, so killed, the sum of $5,000.00.

The questions presented regarding this statute are those presented to this court for the first time.

The effect of the decision of reversal by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, if allowed to stand, will be:

(a) To create a serious conflict between said Circuit Court of Appeals and a large number of federal and state courts touching the true interpretation to be accorded to said New Mexico or cognate statutes; and if valid, whether susceptible of enforcement in a jurisdiction like California where such statutes are contrary to

the spirit and opposed to the policy of the laws of that state.

(b) It will be, in effect, a judicial declaration that a statute of a foreign state, though non-penal in the international sense, may be enforced and administered in another jurisdiction, notwithstanding such foreign statute may be in conflict with and opposed to the policy of the state where it is sought to be enforced.

STATEMENT OF THE CASE.

Petitioner was at all the time here involved, a corporation engaged in the operation of a steam railroad from California to Chicago, operating regular passenger trains for the transportation of persons for hire. In June, 1920, Mary J. Nichols was a passenger on one of these trains; and when passing through the state of New Mexico, she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

O. J. Nichols, the husband of Mary J. Nichols (hereinafter referred to as the plaintiff in error) in his individual capacity, brought an action against your petitioner in the Superior Court of the state of California in and for the county of Los Angeles, for the death of his

wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00 and further damaged in the amount of $586.42 for expenses incident to the last illness and funeral of his wife, for railroad fare and various other specified expenses.

Your petitioner, the defendant in said action, within the time allowed by law asked for and secured the removal of said action into the United States District Court for the Southern District of California, Southern Division, on the ground of diversity of citizenship where the case was tried to the court without the intervention of a jury, a jury having been waived by written stipulation of the parties. Judgment went for your petitioner on findings and conclusions. The case was carried by the plaintiff in error to the United States Circuit Court of Appeals for the Ninth Circuit by writ of error. The assignment of error raised really but one question, namely, whether judgment should have been entered for your petitioner or should have been entered for the plaintiff in error for $5,000.00.

At the time when said action was commenced and during all of the times herein mentioned, the sole recovery allowed by the laws of New

Mexico against a common carrier for the death of a passenger resulting from or occasioned by negligent operation or by any defect or any insufficiency of any railroad or any part thereof or in any locomotive was and is that given by section 1820 of the New Mexico Annotated Statutes of 1915. That statute is also contained in the Compiled Laws of New Mexico of 1884 as section 2308, and in the Compiled Laws of the later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employe, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered, First by the husband or

wife of the deceased, or, Second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, Third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

The Circuit Court of Appeals on the authority principally of Huntington v. Attrill, 146 U. S. 657, reversed the District Court holding that said section 1820 of the New Mexico statutes was non-penal in the international sense, and would be enforced in said cause and court for the benefit of the plaintiff in error [Tr. 67 to 75] and entered judgment reversing the judgment of the District Court in said cause and remanded the cause to said District Court with directions to enter judgment in favor of plaintiff in error for $5,000.00 with costs. [Tr. 75, 76.]

Within the time allowed by the rules of said Circuit Court of Appeals the petitioner requested and petitioned for a rehearing. An order was entered by said Circuit Court of Appeals denying said petition for a rehearing [Tr. 77], but staying its mandate.

The cause is therefore before this Honorable Court on the defendant's petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE ARGUMENT.

I.

The decision and opinion of the Honorable Circuit Court of Appeals for the Ninth Circuit is set out at pages 67 to 75, both inclusive, of the transcript.

The basic rule of law applicable in this case is stated in the opinion of the Circuit Court of Appeals in accordance with the contention of the petitioner and the ruling of the District Court as follows:

> "The defendant in error having removed the action from the court of the state in which it is brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rules that would have controlled it had it not been so removed. It was so held in effect by this court in the case of N. P. Ry. Co. v. Kempton, 138 Fed. 992, 998, 999. See also, Spokane Inland E. Rd. v. Whitley, 237 U. S. 487, and cases there cited." [Tr. 68, 69.]

II.

Under the law of the forum—the law of California— the right to recover for death re-

sulting from injuries incurred as a passenger on a railroad train in New Mexico is only that given by said section 1820 of the laws of New Mexico and there can be no recovery, except such as is allowed by that statute:

McManus v. Canning Co., 37 Cal. App. 133;
Ryan v. No. Alaska S. Co., 153 Cal. 438;
Spokane v. Whitley, 237 U. S. 487;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Clay v. Ry. Co., Texas, 228 S. W. 907;
Phoenix R. R. v. Landis, 231 U. S. 578;
Barnes v. Alexander, 232 U. S. 117;
Northern Pacific v. Hambly, 154 U. S. 349;
Ryan v. North Alaska S. Co., 153 Cal. 438;
St. Louis Ry. Co. v. Seale, 229 U. S. 156;
Kramer v. Ry. Co., 25 Cal. 434;
Spokane, Etc., v. Whitley, 237 U. S. 487;
Gallagher v. Ry. Co., 196 Fed. 1000;
McClain v. Ins. Co., 110 Fed. 80 (91);
Cox v. T. & P., 145 U. S. 593;
Ill. Cent. v. Ihlenberg, 75 Fed. 873;
Spokane I. E. R. Co. v. Whitley, 237 U. S. 487;
Wilson v. Tootle, 55 Fed. 211;
Hopper v. Denver etc., R. Co., 155 Fed. 273;

Derrickson v. Smith, 27 N. J. L. 166;
Bird v. Hayden, 1 Robertson, N. Y., 383;
Pickering v. Fisk, 6 Vt. 102;
Ind. Etc. v. John *et al.*. 5 Hammond (Ohio), 217;
Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839;
Minor on Conflict of Laws, section 10;
Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;
Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;
Grier v. Kansas City Etc. Ry. Co., 228 S. W. R. (Mo.) 454;
Pryor v. Payne, 244 S. W. R. (Springfield Court of Appeals Mo.), 369.

III.

There can be no recovery in California either in the state or federal court under section 1820 of the New Mexico statutes because the policy of that statute is opposed to the policy of the state of California.

Lange v. Schoettler, 115 Cal. 388;
Bond v. United Railroads, 159 Cal. 270;
Redfield v. Ry. Co., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Slater v. Mex. Nat. Co., 194 U. S. 120;
Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747;
Christilly v. Warner, 87 Conn. 461, 88 Atl. 711;
Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Marshall v. Ry., 46 Fed. 269;
Clay v. Ry. (Tex.), 228 S. W. 907;
Casey v. Ry. 116 Mo. App. 235, 91 S. W. 419;
Huntington v. Attrill, 146 U. S. 657;
Moss v. Smith, 171 Cal. 777;
Patterson v. Thompson, 86 Fed. 85;
Bank v. Remsen, 158 U. S. 337;
Mo. Pacific v. Ault, 256 U. S. 557;
Boston, Etc. v. Hurd, 108 Fed. 116;
Hill v. Boston, Etc., 77 N. H. 151, 89 Atl. 482;
Armbruster v. Ry., 166 Iowa 155, 147 N. W. 337;
Story v. Green, 164 Cal. 768.

ARGUMENT.

I.

The said Circuit Court of Appeals, in accordance with petitioner's contention and the ruling of the District Court, having held that

the case is governed by the rule that would have controlled it had it not been removed into the Federal Court and having also held that plaintiff can recover in this action, if at all, under section 1820 only, of said New Mexico statute, we suggest what we conceive to be the sole question in this case, namely:

Could or could not the plaintiff in error in this case have recovered in the state court had the case not been removed to the federal court?

The opinion of the Circuit Court of Appeals proceeds, we respectfully submit, upon the assumption that plaintiff in error could have recovered in the state of California unless the New Mexico statute is to be regarded as penal.

But we respectfully submit that to determine the New Mexico statute non-penal is not an answer to the question whether the plaintiff could have recovered in the state court of California.

For state courts have frequently refused a recovery upon a foreign statute, not on the ground that the foreign statute was penal, but on the ground that the foreign statute declared a policy of law inconsistent with the policy of the forum in which the suit was brought.

This is illustrated in the case of McManus v. Canning Co., 37 Cal. App. 133, where the court said:

> "Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska is contrary to the policy of the law of California and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the compiled laws of Alaska of 1913, codified by authority of the Act of Congress of August 24, 1912, chapter 387, section 19, 37 Stats. 518, and chapter 45 of the Session Laws of the Territory of Alaska, for 1913, approved April 3, 1913."

The court then quotes the statutes of Alaska and proceeds at the bottom of page 136:

> "It is settled law that an action for wrongful death like other actions on tort is governed by the law of the jurisdiction where the tort was committed, and as it is a transitory action it may be maintained in any jurisdiction where the defendant is found (citing cases) *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the express provisions or the general policy of the law* of its own jurisdiction. (Citing authority.)"

Then after discussing the meaning of the Alaska statute, section 1185, the court says, referring to a decision of said Ninth Circuit Court of Appeals:

> "It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death upon the personal representative of the decedent for the benefit of

the estate and that any damages recovered become assets of the estate to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any, and in default of heirs the state takes by escheat. We fully agree with counsel for respondent that this right of action created by section 1185 is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely that the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of said aid.

"Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby."

There was in the foregoing case of McManus no question of a penal statute, but solely a question of a difference in policy, and while

the courts of California have not been called upon to determine the consistency or inconsistency of the policy of California with the policy of the New Mexico statute, certainly the New Mexico statute is much further removed in policy from the law of California and the policy of California than was the Alaska statute under which the California court held that no recovery could be had in this state.

To the point that the policy of the New Mexico statute is opposed to the established policy of the state of California we invite attention to the fact that the New Mexico statute, or the same statute of Missouri, has been the ground of action in Kansas, in Texas, in Illinois, in Iowa, and while some of the cases have spoken of the statute as penal, yet they have also declared that the policy of the statute is at variance with the policy of the forum and in every case have refused a recovery. What possible ground is there for assuming that California would be the one only state to allow recovery under the New Mexico statute?

As "death statutes" have been almost universally enacted, the discussion of "policy" usually turns on the extent of similarity between the local and foreign enactments.

If a right of action is given by a statute (not of a penal nature) of the state in which the injury and death occurred, the remedy may

be enforced in any tribunal having jurisdiction of the defendant, *provided,* of course, that a substantially similar statute exists in the state of the tribunal. We do not claim that it is essential that the statute be precisely the same, but if it is of similar import and character it will suffice.

This, we understand, is the ruling in:

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

Without discussing in detail the questions of the similarity and dissimilarity of the various statutes involved in the many decisions on this subject, it is enough to say that where the foreign statutes were enforced, there was no substantial dissimilarity between the statutes involved and those of the forum. But in every case where either the Missouri or New Mexico statute was sought to be enforced or administered in a state other than that in which enacted, the state tribunals refused to administer or enforce either of said statutes upon the ground that such statutes were opposed to the *lex fori.*

II.

The Policy of Section 1820 of the Statutes of New Mexico Is Opposed to the Policy of the State of California and It Is Submitted That There Is Nothing in the Case of Huntington v. Attrill, 146 U. S. 657, That Is Authority for the Enforcement in California of Said Section of the New Mexico Statute.

The Circuit Court of Appeals rests its opinion on the theory that the instant case is ruled by the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. Really the decision was based upon a consideration of the remedial provision of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;
National Park Bank v. Remsen, 158 U. S. 337;
Chase v. Curtis, 113 U. S. 452.

In the footnotes to section 10 of Minor on Conflict of Laws, may be found an illuminating discussion of the case of Huntington v. Attrill, 146 U. S. 657. The writer points out that it was not necessary to a decision in that

case to decide whether the New York statute was penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The pertinent observations of the author are those respecting the enforcement of the foreign statute under rules of private international law and international comity. We quote what is there said because it is so peculiarly applicable to the situation here:

> "But in private international law, the ground of the enforcement of a foreign law is international comity, which is nothing more than the enlightened sentiment that exact justice may be meted out by requiring that a man's acts should be governed by the law under which he acts, provided the enforcement of that law will not conduce to injustice nor affect the interests of the forum. But if to hold a wrongdoer liable in double or treble damages to the party injured is not punishment to the former, it is certainly more than justice to the latter. *Justice* to him is satisfied by *compensatory* damages. Hence the forum, in endeavoring to mete out exact justice to the parties by enforcing a foreign law rather than its own, will find itself, under this view rendering to the injured party more than justice requires, and at the expense of the other litigant. He has a right to demand this under the *municipal* law, not because of justice, but because the positive law requires or permits it. But where he seeks to enforce his claim in another state, what right has he to ask this of the forum whose policy may be entirely different?"

So in the instant case, if the plaintiff were suing under California law for damages for alleged wrongful death in the courts of that state, he would be limited to the pecuniary loss suffered, as disclosed by the evidence, whereas, by invoking and seeking to enforce the provisions of the New Mexico law, assuming that actionable negligence has been shown, he recovers the arbitrary sum of $5000.00.

Prior to 1905 the Missouri statute read, so far as material here,

"shall forfeit and pay the sum of $5000."

In 1905 this statute was amended so as to read,

> "* * * shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury, which may be sued for and recovered * * * by,"

In the case of Grier v. Kansas City etc. Ry. Co. (228 S. W. R. 454), the Supreme Court of Missouri held that this statute was penal as to all amounts that might be recovered thereunder, and that it was in no sense compensatory as to sums exceeding $2000.00; the legislative purpose being to allow the jury to assess the punishment in accordance with the negligence and the loss.

Accordingly, the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne (244 S. W. R. 369) held that there could be no recovery under this statute for the death of a traveler on a highway crossed by the railroad, against the Director General of Railroads because of any neglect in the operation of railroad trains, since such statute is purely penal and in no sense compensatory.

The case of The State of Indiana for the use of Cone v. John *et al.*, 5 Hammond (Ohio) 217, was an action on an official bond prescribed by the laws of Indiana and which allowed recovery to anyone injured by official default, to treble damages, full costs and charges. The Ohio court refused to enforce the remedy and said:

> "A state can enforce its contracts in our courts, the same as an individual suitor; but the remedy must be afforded according to our laws and practice."

Derrickson v. Smith, 27 N. J. L. 166:

This was an action in the New Jersey Circuit Court founded upon a statute of New York requiring corporations to file and publish annual reports, showing the condition of their affairs; a failure to file and publish such reports made the trustees jointly and severally liable for all debts then existing.

It was held that this statute could not be enforced in New Jersey because it was in the nature of a penalty for official neglect of duty.

Bird v. Hayden, 1 Robertson, N. Y. 383:

In that case it was held that personal liability imposed by Massachusetts statute upon the officers of a corporation who neglected or refused the performance of a duty, with which they were charged by the statute, was in the nature of a penalty, and designed as punishment for such neglect, and the New York court refused to enforce the statute.

Pickering v. Fisk, 6 Vt. 102:

This was an action on a sheriff's bond executed in the state of New Hampshire for the public security; that an action might be brought thereon for the benefit of anyone injured by official default. The Vermont court refused to entertain an action against the sheriff and his bondsmen, giving as reasons therefor that:

> "no sovereign state is bound by the laws of another, nor can the laws of another state operate *proprio vigore* within it. The observance of foreign laws rests in comity and convenience, and is a disposition of courts to adapt their proceedings to the great ends of justice. But there is a limit to this principle of comity; and cases may and do arise, where the observance of foreign laws would neither be convenient, nor answer the purposes of justice. For-

> eign laws, therefore, are not regarded, where they are irreconcilable with our own regulations, nor where, in our opinion, they conflict with our established policy."

Finney v. Guy, 189 U. S. 335:

This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation in Minnesota and doing business in that state. A demurrer was interposed to the complaint. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the state. The case was taken to this Honorable Court by the plaintiff to review the judgment of reversal. Under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations was a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who could be served with process. This Honorable Court held that the courts of Wisconsin did not deny full faith and credit to a judgment of the Minnesota court against resident stockholders by denying the right to maintain a further action to enforce such liability outside the state. The court further said:

> "Whether, aside from the federal considerations just discussed the Wisconsin court should have permitted this action to be

> maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a federal nature, and we cannot supervise the action of the Wisconsin court in this particular. The judgment of the Supreme Court of Wisconsin must be affirmed."

Under the law of California "the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

Bond v. United Railways, 159 Cal. 277.

Nor can exemplary damages be awarded even if the act causing death was wanton, since section 377 of the California Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived.

Hence, only such damages can be recovered as the statute authorizes, and cannot include any grievance personal to the deceased nor any "damage allowed in the interests of the people as punishment."

Lange v. Schoettler, 115 Cal. 388.

In the case of Hopper v. Denver, etc., R. Co., 155 Fed. (Eighth C. C. A.) 273, the court

had under consideration a Colorado statute which created an action for death negligently caused by a public carrier and which statute declared that every such public carrier should forfeit for every person and passenger, so injured or killed, not more than $5,000.00 nor less than $3,000.00. The question of the validity of that statute was left open and the court also passed over, without deciding, whether the statute, if valid, could be enforced outside of the state court of Colorado. In other words, the court left open the question as to whether the Colorado statute could be enforced or administered in a federal court sitting in Colorado. Mr. Justice Van Devanter, speaking for the court, made this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3,000.00, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado * * *."

This observation was prompted doubtless by the long list of cases on the subject which are cited in the court's opinion, many of which are referred to in this brief and all of which are cited in the petition for the writ of certiorari herein.

If the enforcement of the Colorado statute in a federal court, sitting in that state, was a question of serious doubt, obviously, it ought to be decisive of the proposition that the New Mexico statute here involved cannot be enforced or administered in California or in a federal court sitting in that state, and that the New Mexico statute can be enforced or administered if at all in a state court of New Mexico only.

III.

Under the New Mexico statute, if the plaintiff recover he will recover five thousand dollars, neither less nor more.

Romero v. Atchison, 11 N. M. 679, 72 Pac. 37;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;
Marshall v. Wabash, 46 Fed. 269;
Clay v. Ry. Co. (Tex.), 228 S. W. 907.

He recovers this amount without proof of damage, with no opportunity afforded the defendant to show that no damage has resulted.

Casey v. St. Louis Etc., 116 Mo. App. 235, 91 S. W. 419;
Raisor v. Chicago Etc., 215 Ill. 47, 74 N. E. 69.

But the policy of California is that the amount of the damages in such cases shall be

determined according to the evidence of pecuniary loss and that they shall be strictly compensatory for the pecuniary loss as proved.

Section 377, Code of Civil Procedure, reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an act for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other persons. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section has, of course, been under consideration in the courts of California many times. Thus in the case of Lange v. Schoettler, 115 California 388, Mr. Justice Temple, writing the opinion of the court, said:

> "The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary damages, if the act causing death was wanton, cruel and malicious. I think this instruction erroneous and that it was probably given under much misapprehension as to our statutes upon the subject. It has been uniformly ruled that the action provided for in section 376 of the Code of Civil Procedure is a new action and not the action

which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes and in the absence of an express provision authorizing a different rule the only damage allowed is for the probable value of the life to those in whose behalf the action is brought. Of course this cannot include any grievance personal to the deceased or any *damage allowed in the interest of the people as punishment.*

* * * * * * *

"The statute of 1862 expressly allowed the jury to give exemplary damages, and this provision was carried into the first editions of the codes. It authorized such damages 'pecuniary and exemplary' as the jury should deem just. In 1874, section 377 was amended by striking out the words 'pecuniary and exemplary.' The purpose of this amendment must have been to take away the right to exemplary damages and to make the rule accord with the general rule elsewhere.

"The decisions upon this matter are cited and discussed in Munro v. Pacific Co., 84 Cal. 515. In that case, while holding that in the case of a wife or mother, showing under the statutes the jury may take into consideration the loss of the comfort, society and protection of the deceased, yet the remark of Mr. Justice Wills that the subject matter of the statute is compensation for injury by reason of the deceased not being alive, is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relative. In the same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow,

> grief, etc., of the mother. Instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss."

In Redfield v. Oakland Ry., Etc., 110 Cal. 277, the opinion said it is contended by appellant that so many states have determined that it is wise to limit the amount that can be recovered as damages in cases like the present that we should look to such limits in determining the amount to be recovered and be governed thereby; but such statutes were in existence long before section 377 of the Code of Civil Procedure was enacted, and this provision of the code is a direct *determination of our Legislature that the policy adopted by other states in that regard should not exist here.*

In Parsons v. Easton, 184 Cal. 765, opinion by Justice Shaw, at page 770, he quotes from Bond v. United Railways, 159 Cal. 277:

> "The damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

In the case of Parsons against Easton, a verdict of $6,000.00 was held to be clearly greater than the evidence warranted for the death of a son 27½ years of age, who had been

at times insane, and who was somewhat deformed.

The courts of California have not been asked to enforce this statute of New Mexico, but the courts of other states having the same policy that California has concerning measure of damages, have repeatedly refused to allow recovery under the New Mexico statute or under the statute of Missouri from which the New Mexico statute was copied.

In Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69, the court, after discussing the statute of Missouri, which was the same as the statute of New Mexico, said near the close of the opinion:

> "Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained. (Citing cases.) In 1845 the Legislature adopted as the law of this state the common law of England and all statutes or acts of the British Parliament made in aid thereof and to supply the defects of the common law prior to the 4th year of James the First. This includes the common law forms of action, *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto* or in any action sounding in damages cannot recover substantial damages

without proof that he has suffered some. Two elements must concur to entitle the plaintiff to recover substantial damages—injury and actual damages—and these two must be proved. On proof of injury alone nominal damages may be recovered, as the law presumes some damage on proof of injury. But there can be no recovery of actual or substantial damage in the absence of proof thereof. But the Legislature has expressed itself with regard to the very subject matter of the present suit, namely the death of a person caused by wrongful act, neglect or default. In such case an action may be brought in the name of the personal representative of the deceased for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair a just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding $10,000.' (Citing the statute.) Our statute is substantially a copy of the first two sections of 9 and 10 Victoria, chapter 93, and of the New York statutes on the same subject, and it has been held in England, New York and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages and that when there has been no pecuniary loss there can be no recovery. (Citing cases.) It is therefore as we think contrary to the policy of this state as evidenced by the acts of the Legislature to permit a recovery for damages on mere proof of neglect or default of the defendant and without proof that the plaintiff has suffered any pecuniary loss."

In Marshall v. Wabash, 46 Fed. 269, in considering the same Missouri statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely and not penal."

Judge Sage makes this very pertinent suggestion:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitarary, inflexible rule, would be in conflict with the constitutional right of the defendant to a jury trial."

The New Mexico statute itself came before the court of Kansas in Dale v. Atchison, 57 Kas. 601, 47 Pac. 521, the court saying that it was the same in substance as the Missouri statute which had been under consideration in Hamilton v. Ry., 39 Kas. 56, 18 Pac. 57; that it had been held by the courts of Missouri that

the recovery must be for the full amount and nothing less, and that a verdict for half the amount, or $2500.00, would be set aside by the court, and adds:

> "Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico, although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow or minor children and that they are the ones usually, if not invariably, the most injured by his death, and that the money to be paid under that statute subserved really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of husband and father, it is apparent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family, contributing nothing to them."

And the court felt constrained to hold "that the courts of this state will not undertake the enforcement of a statute penal in part and *so dissimilar in principle from the law of our own state.*"

In Clay v. Ry. Co. (Tex.), 228 S. W. 907, the court remarked that the recovery provided for by section 1820 of the statute of New Mexico is inflexible and is aimed at the culpability of employes of the railway company rather than

based upon the extent of injury, thus partaking more of the nature of a penalty than of a right created.

Mattheson v. Kansas City, Etc., Ry. Co., 61 Kansas 667, 60 Pacific 747, involved the statute of Missouri to which reference has already been made in this brief. The court referred to the Dale case, already cited, and adds that an arbitrary award of a fixed amount of damages regardless of pecuniary loss sustained is antagonistic to the policy of Kansas, and is palpably inconsistent with the Kansas statute authorizing a recovery in such cases, where the plaintiff must show a pecuniary loss and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered.

> "There have been a number of such cases, illustration of which can be found in Railroad Company v. Weber, 33 Kansas 543, 6 Pacific 877, where the jury especially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary fixture of $5,000 in such a case arising under the Missouri statute would be peculiarly punitive, and the fact that the penalty was bestowed on relative of the deceased would not take away the penal character of the award. It is contended that the statute is not penal and cannot be so regarded, unless the penalty is

> paid to the state as a punishment for the wrong committed. In a strict and limited sense, a penal statute is one imposing punishment for an offense committed against the state."

Christilly v. Warner, 87 Conn. 461, 88 Atlantic 711, was an action brought in the state court of Connecticut to recover for wrongful death suffered in Massachusetts. The court lays down certain general principles and discusses the Massachusetts statute as it gradually developed into its present form (which permits a recovery of not less than $500 or more than $10,000, to be assessed with reference to the degree of defendant's culpability or that of his agents or servants), and then said:

> "We have never allowed a recovery in a case of a negligent death upon any theory save that upon just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law."

Some of these opinions characterize the New Mexico and Missouri statutes as "penal." It i not penal according to the strict use of that term as explained and elaborated in Huntington v. Attrill, 146 U. S. 657, quoted by plaintiff in error at pages 7 to 21. But the New

Mexico statute is penal in the common use of the term; that is, it imposes a penalty.

In Moss v. Smith, 171 Cal. 777 (784) it is said:

> "Huntington v. Attrill, 146 U. S. 657, upon which appellants rely as supporting their contention that section 309 is a remedial and not a penal statute is explained by Judge Gilbert in Patterson v. Thompson, 86 Fed. 85, who shows that the question before the Supreme Court was solely whether such statutes were penal law in the sense in which the word is used in international law."

The same statute that was under consideration in Huntington v. Attrill was again before this Honorable Court in International Park Bank v. Remsen, 158 U. S. 337, and it was distinctly declared to be in its nature a penal statute as had previously been held in Chase v. Curtis, 113 U. S. 452.

In Patterson v. Thompson, 86 Fed. 85, involving the personal liability under the Oregon statute of a director in a saving bank, it is said (p. 87):

> "Counsel for plaintiff contended that by the decision in Huntington v. Attrill, 146 U. S. 657, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on careful consideration of that case, that the decision was based upon a consideration of

> the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S. 337, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not a penal law in the international sense."

National Park Bank v. Remsen, 158 U S. 337; opinion by Justice Brewer; suit for recovery under New York statute for failure of directors to make report (page 342), the opinion says:

> "That this statute is one of a penal character is settled, not merely by various decisions of the court of appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S. 452, though as since held not a penal law in the international sense. Huntington v. Attrill, 146 U. S. 657."

Mo. Pac. v. Ault, 256 U. S. 554, was a suit to recover wages under a statute of Arkansas providing that if a railroad company should discharge an employe it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employe should continue at the same rate until

paid. In the lower court Ault recovered $50.00, his wages up to the time of discharge and $390.00, wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of a punishment; that the Supreme Court of Arkansas had held that it was not technically a penalty, but was allowed for a double purpose, namely as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

And that the judgment against the director general so far as it provided for recovery of the *penalty* was erroneous.

But the principle underlying all the opinions which we have cited, denying recovery of arbitrary amounts fixed by the law of another state, is really that those statutes are contrary to the policy of the forum. If the law of the forum gave similar right, the court would sustain a complaint under the foreign law.

It is also true that the doctrine of Huntington v. Attrill requires a court of California to permit recovery upon a judgment recovered in another state, although that judgment was obtained on a complaint which would not be held

to state a cause of action in California. For instance, if a plaintiff recovers judgment in Louisiana on a gambling contract, he may sue on that judgment in California and recover, although he could not have recovered here on the contract itself. He must still reduce his demand, whatever it be, to judgment in a court of some jurisdiction whose policy permits recovery on such a demand. Thus the federal court sitting in New Hampshire will entertain an action on the Massachusetts statute, giving a recovery of damages for wrongful death and not measuring the damages by the rule of compensation.

Boston, Etc. v. Hurd, 108 Fed. 116.

That accords with the policy of New Hampshire.

Hill v. Boston etc., 77 N. H. 151, 89 Atl. 482.

The case of Huntington v. Attrill was decided in 1892, thirty years ago; and ever since then the courts, both state and federal, have gone on as before enforcing the policy of the *lex fori* and uniformly refusing judgment contrary to that policy; with the single exception that in a suit on a judgment obtained in a sister state on due process of law in an action not strictly penal, the respective policies of the two states cannot be considered.

Before the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery in the federal court in Ohio:

Marshall v. Ry. Co., 46 Fed. 269;

and since that decision in the state courts of Texas:

Clay v. Ry. (Tex.), 228 S. W. 907.

Kansas:

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747.

Iowa:

Armbruster v. Ry. Co., 166 Iowa 155, 147 N. W. 337.

Illinois:

Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

And in every instance where either of these statutes has been made the basis of an action in another state, either before or since the case of Huntington v. Attrill, recovery has been refused.

A similar case is

Christilly v. Warner, 87 Conn. 461 (1913), 88 Atl. 711.

Defendant negligently killed a child in Massachusetts, where the statute provided that he

should be liable in damages in the sum of not less than $500 nor more than $10,000, to be assessed with reference to the degree of his culpability, one-half to be for the use of the widow and one-half for the use of the children of the deceased, or if no widow the whole to the use of the next of kin. The court said:

> "We do not enforce the foreign statutes which are penal. We do not enforce the law of another jurisdiction which we conceive to be injurious to our public rights or to the interests of our citizens or which offend our morals or contravene our public policy or violate our positive laws. We have never allowed a recovery in a case of negligent death upon any theory save that of just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law." (Citing cases.)

Again:

It is contrary to the public policy of California to differentiate between common carriers and other defendants in personal injury cases with respect to the measure of damages. In this state the rule of compensation applies in favor of all and against all, so that neither plaintiff's poverty nor defendant's wealth shall be permitted to augment damages for simple negligence.

Story v. Green, 164 Cal. 768.

The refusal of state courts to entertain actions on foreign laws not harmonizing with the policy of the forum is not condemned by this Honorable Court—is indeed approved and adopted.

Slater v. Mexican National R. Co., 194 U. S. 120, 48 L. Ed. 900, was an action in the federal court in Texas to recover for death suffered in Mexico. The court considers the Mexican statute and the provisions made by that statute with respect to decree, damages and parties benefited, and adds:

> "The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statute. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. * * * Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts." (Citing cases.)

IV.

It is submitted that section 1820 of the New Mexico statutes upon which plaintiff's alleged cause of action is predicated, which arbitrarily declares a forfeiture and requires the payment of $5,000.00 neither less nor more exclusively

in the case of the death of a person resulting from injuries incurred while a passenger upon a railway or stage line, is so widely at variance with and so radically different from the settled policy of California, respecting the measure of damages, that such foreign statute would not be administered or enforced by the courts of California.

It is further submitted that the New Mexico statute is directly opposed to the policy of California in that it treats common carriers, in case of the death through negligence of a person as passenger thereon, as *sui generis*, whereas, in California, but one cause of action is given, a single standard of liability created, against all *tort feasors*, be they individuals, corporations or common carriers. It is perceived that the New Mexico statute is further radically different in that regard and that these are material departures from California laws and policies.

In conclusion, we respectfully submit that upon the authorities cited and for the reasons hereinbefore given, including the reasons urged in the petition for the writ of certiorari herein, that section 1820 of the statutes of New Mexico is not enforcible for the benefit of the plaintiff in error in this action.

Therefore, it is submitted that the judgment of the Circuit Court of Appeals ought to be

reversed; and the judgment of the United States District Court for the Southern District of California, Southern Division, in favor of the petitioner, affirmed.

March 15, 1923.

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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. ~~358~~ 764

In the Matter of the Petition of the Atchison, Topeka & Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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IN THE

SUPREME COURT

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In the Matter of the Petition of the Atchison, Topeka & Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

I.

The Petition for Certiorari Does Not Disclose That This Case Is One of Such Peculiar Gravity and General Importance as to Require a Review by This Court of the Decision of the Circuit Court of Appeals herein, Nor Does It Appear That There Is a Conflict of Decisions Concerning the Statutes Sued On.

Jurisdiction of the Federal Court in this case arises solely upon the ground of diverse citi-

zenship. The suit was originally commenced by respondent, a citizen of California, in the Superior Court of said state in and for the county of Los Angeles against petitioner, a resident of Kansas. The case was removed on motion of petitioner to the Federal District Court for the Southern District of California. There is no Federal question involved. The judgment of the Circuit Court of Appeals is final and if the plaintiff in error is entitled to a writ of certiorari at all, it is only by virtue of section 240 of the Judicial Code. We understand that the power vested in the Supreme Court under said section 240 of the Judicial Code to review final judgments of Circuit Courts of Appeal will not be invoked unless:

1. The circumstances of the case are such as to satisfy this court as to the importance of the question involved.

2. It appears to the court that there is a necessity of avoiding conflict between two or more Federal courts of appeal or between Federal courts of appeal and State courts.

3. The matter involved affects the interests of this nation in its external or internal relations.

Before the petitioner is entitled to a writ of certiorari in this case, it must show that the importance of this case is such that the judg-

ment of the Circuit Court of Appeals should be reviewed or that there is a conflict between the decision of the Circuit Court of Appeals in this case and decisions of other like tribunals or state courts concerning the statute in question, to-wit, section 1820 of the New Mexico statutes. Counsel for petitioner do not advance any argument which would indicate that this case is of such peculiar gravity and importance that this court should grant its petition, but petitioner apparently relies principally upon its contention that there is a conflict of decisions concerning the general question of law involved in this case, but not the statute of New Mexico above mentioned and therefore that its petition for certiorari should be granted by this court. We feel that under the following cases of this court, the petition for writ of certiorari should be denied:

Forsyth v. Hammond (1897) 166 U. S. 506, 17 S. Ct. 665, 41 U. S. (L. Ed.) 1095;

American Construction Co. v. acksonville etc. R. Co. (1893), 148 U. S. 372, 13 S. Ct. 758, 37 U. S. (L. ed.) 486;

Lau Ow Bew, petitioner (1891), 141 U. S. 583, 587, 12 S. Ct. 43, 35 U. S. (L. ed.) 868, 869.

II.

The Decision of the Circuit Court of Appeals in This Case Is Not in Conflict With Any Decision of Either State or Federal Courts Concerning Section 1820 of the New Mexico Statutes.

We understand that this court will only invoke its power to review the judgment of a Circuit Court of Appeals on the ground of a conflict of decisions when the conflict involves some particular statute. So far as we have been able to ascertain, the statute sued on here has never, except in the case at bar, been passed upon by any Federal or State Court other than the State Court of the state of New Mexico in the case of Romero v. Railway Co., 11 N. M. 679, 72 Pac. 37. As the Supreme Court of California has never passed upon this statute, there of course can be no conflict between the decision of the Circuit Court of Appeals and the courts of California. Counsel contend that the general policy of the New Mexico statute is contained in other statutes of various states which have been passed upon by Federal and State Courts and that as the policy of these statutes is more or less similar, the decisions of other courts concerning such statutes should be taken into consideration in determining the question of conflict between the decision of the

Circuit Court of Appeals herein and decisions of other Federal and State Courts involving statutes of a similar nature. We feel that the only question of conflict which concerns us here must be confined to the statute in question. If there are no cases involving this particular statute that are in conflict with the decision of the Circuit Court of Appeals in this case, then there is no actual conflict within the meaning of the rule adopted by this court in granting writs of certiorari where there is a conflict of decisions. Notwithstanding counsel's contention that the decision of the Circuit Court of Appeals in this case conflicts with various other decisions cited by counsel, we contend that this decision is supported by the decisions of the Federal courts including many decisions of this court concerning the enforcement of statutes of a similar nature in a state other than where enacted.

The case of Ryan v. North Alaska Canning Co., 153 Cal. 438, is the only declaration of the Supreme Court of California on the subject of foreign statutes in negligence cases and the same supports the right to enforce the law of another state as there declared, ~~statutes similar to the one in question in this state~~. This case and not the case of McManus v.

Red Salmon Canning Co., 37 Cal. App. 133, cited by counsel for petitioner, establishes the law in the state of California relative to the enforcement of statutes similar to the statute sued on in the case at bar. In the case of Ryan v. North Alaska Canning Co. at page 439, the court said:

> "The demurrer was properly sustained. Where the action as here is transitory in its nature, a right or liability imposed by the statute of another state, or of the United States, may in proper cases be asserted and enforced in this state. Such may be taken to be the settled rule since the case of Dennick v. Railway, 103 U. S. 11. But the courts of this state will only entertain such an action for the purpose and upon the terms permuted by the *lex loci*. In other words, the right to prosecute this action in California is permissible under the laws of Alaska and only upon such terms as the laws of Alaska prescribe."

The case of McManus v. Red Salmon Canning Co., *supra*, cited by counsel, is not, in our opinion, controlling upon the subject in question for the reason that the same is a decision of the District Court of Appeal of California, which is not a court of last resort. (See People v. Davis, 147 Cal. 350; Stratton v. Stratton, 239 U. S. 55.) The opinion in the case of McManus v. Red Salson Canning Co., *supra*, does not deal with the question of enforcement

of penal damages arising under the law of another state or the rule of damages in California. It considers only the question whether one who is neither kin nor dependent of a deceased person may recover damages in California for his death and then decides that question is not involved, hence what is said on the point is *obiter dictum*. In view of the foregoing, we do not believe that it can be said that the case of McManus v. Red Salomn Canning Co. is in conflict with the decision of the Circuit Court of Appeals in this case.

The other cases cited by counsel as being in conflict with the decision in this case are easily distinguishable and a comparison of these various authorities with the decision herein obviates the necessity of argument showing their inapplicability. None of the cases cited by counsel involve section 1820 of the New Mexico statutes. Should counsel find any support in these cases, however, suffice it to say that they only contribute to the minority rule concerning the enforcement of statutes similar to the one sued on and that the decision of the Circuit Court of Appeals herein is in conformity with the majority rule upon said sub-

ject and is supported by the following Federal authorities:

Huntington v. Attrill, 146 U. S. 657-689, 36 L. Ed., pp. 1123-1135;

Dennick v. Central Railway Co., 107 U. S. 17;

Northern Pac. Railway Co. v. Babcock, 154 U. S. 190-203;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Stewart v. Railway Co., 168 U. S. 445;

Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., pp. 503-509;

Ill. Central Ry. Co. v. I. H. Lenberg, 75 Fed. 873;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

Mo. Pac. Ry. Co. v. Hune, 115 U. S. 512;

Weissengoff v. Davis, 260 Fed. 17;

Dexter v. Edmans, 89 Fed. 467-473.

"Boston & M. R. R. v. Hurd, 108 Fed. 116, wherein the Circuit Court of Appeals for the First District held that the statute of Massachusetts allowing damages for death on a railroad in a sum not less than $500.00 nor more than $5000 was enforceable in the state of New Hampshire—damages under the New Hampshire law being based upon compensation."

The case of Marshall v. Railway Co., 46 Fed. 269, cited by counsel, was decided before the case of Huntington v. Attrill, 146 U. S. 657, and therefore the value of this decision, whatever it might have been, was destroyed by the opinion of this court in the case of Huntington v. Attrill.

The case of Slater v. Mex. Natl. Ry. Co., 194 U. S. 120, cited by counsel for petitioner, does not support their contention. The dissimilarity of the statutes before the court in that case and in this one is so obvious that argument is unnecessary.

The case of Mo. Pac. v. Ault, 256 U. S. 554, relied upon by counsel is inapplicable to the question before the court in this case, and this case does not attempt to change the rule adopted by this court in the case of Huntington v. Attrill.

The case of Hooper v. Denver etc. Ry., 155 Fed. 273, does not pass upon the enforceability of the statute there involved and therefore is of no aid here. We do not believe that the decision of the various state courts, cited and relied upon by counsel, are entitled to any consideration by this court, as all of these cases undertake to ignore the rule of law established by this court in the case of Huntington v. Attrill.

III.

The contention of counsel for petitioner that the section 1820, of the New Mexico statutes is contrary to the policy contained in section 377 of the Code of Civil Procedure of the State of California is without support. Section 377 of the C. C. P. of this state is a substitute for Lord Campbell's Act and takes away the common law disability to sue for the death of one caused by the wrongful act of another; designates the person who may maintain the action and provides that such damages may be given as under all the circumstances of the case may be just. The Codes of California do not pretend to enact laws with reference to the rights of property or causes of action arising in other states and section 377 C. C. P. providing the measure of damages, has reference to and could only have reference to damages given for the death of a person in California caused by the wrongful act of another in that state. It has never been contended in our judicial procedure that a citizen of the State of California or a stranger for that matter, could not maintain an action in the courts of said state to recover a chose in action arising in another state. California procedure by comity and under constitutional guarantees is open to all who have rights to enforce. Section 377 C. C. P. does not establish a policy against

penal damages in California. For illustration, we instance the penalty provided in California by sections 3347-3348 of the Civil Code in reference to duelling. They are as follows:

> "If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance to be determined by the court."
>
> Civil Code, Sec. 3347.
>
> "If any person slays or permanently disables another person in a duel in this state, the slayer is liable for and must pay all debts of the person slain or permanently disabled."
>
> Civil Code, Sec. 3348.

Surely it cannot be said that these sections of the code are measured by the standard of exact compensation, or that they differ in any respect from the New Mexico statute, except that they are more penal in character. Those in reference to the death of duelling are as uncertain and expansive as the wants of the widow and the wants and number of minor children of the person slain. And what could be more drastic or penal than the obligation to pay all

the debts of the person slain or permanently injured.

Other instances of statutory penalties are those shown by sections 3344 and 3345 of the Civil Code in reference to tenants wrongfully holding possession of real property being liable for treble rents as damages; section 3346 providing for treble actual damages for injury to timber, trees, etc.; section 3346A providing for treble damages against one suffering any fire to extend beyond his own land; section 3319 vesting the sound discretion of the jury the question of damages for the breach of promise of marriage, and section 3294 providing for exemplary damages by way of example. The provisions of the above mentioned statutes would not seem to indicate a public policy in California that would exempt a railroad company from its statutory obligation when a passenger is killed by its wrongful act, and there is nothing therein to indicate that the Legislature of California or judicial decisions of its courts intend to deny to a citizen of California his rights arising under the statute of another state. It is a novel argument that the legal procedure of California affords a remedy to one of its citizens for rights arising within the state, but denies a remedy to him for such rights arising in another state.

This action is properly maintainable in the courts of California under the authority of Ryan v. North Alaska Canning Co., 153 Cal. 439, heretofore cited and quoted from.

In conclusion, we respectfully submit that the exigencies of this case are not of such importance as to require this court to grant the petition of plaintiff in error for a writ of *certiorari* nor are the decisions of the Federal courts or State courts concerning the statute in question in conflict with the decision of the Circuit Court of Appeals in this case. For these reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

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Office Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 268.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Petitioner and Defendant in Error,

vs.

O. J. Nichols,
Plaintiff in Error.

Petitioners

Brief and Argument for Defendant in Error.

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TOPICAL INDEX.

PAGE

Statement of the Case 3
Nature of the Action 3
Statute Involved (N. Mexico, Sec. 1820) 5, 6
Removal of Action to Federal Court 7
Judgment for Petitioner in District Court 8
Proceedings in Circuit Court of Appeals 8
View of Circuit Court of Appeals 8, 9
Writ of Certiorari Issued by Supreme Court 9
Stipulation That Record Accompanying Petition for Certiorari May Be Considered as Return Thereto 9
Points and Specification of Errors Relied Upon 9-12

Brief of the Argument 12
Basic Rule of Law Applicable Stated in Opinion of Circuit Court of Appeals 12
Under N. Mexico Law Right to Recover for Death of Passenger on Railroad Train Is Only That Given by Sec. 1920 N. M. Stat. 12, 13
No Recovery Either in State or Federal Court in California Under Sec. 1920, N. Mexico Stat., Because Opposed to the Policy of California 14
Case Governed by Same Rules Controlling in State Court 16
Plaintiff in Error Could Not Have Recovered in State Court 16
N. Mexico Stat. Sec. 1820 Antagonistic to Policy of California 19
Case of Huntington v. Attrill Not Authority for Enforcement in California of N. Mexico Stat. 21
Under Law of California Damages Limited to Pecuniary Loss Suffered by Person for Whose Benefit Right of Action Given 29

PAGE

Under N. Mexico Stat., Sec. 1820 if a Plaintiff Recovers, He Recovers the Arbitrary Amount of $5000 Without Proof of Damage With no Opportunity Afforded Defendant to Show That no Damage Resulted.....33-35

N. Mex. and Mo. Stats. Denied Enforcement Where Made Basis of Action in Another State 49, 50

N. Mex. Stat. Discriminates Between Common Carriers and Other Corporations and Individuals 51

Contrary to Public Policy of California to Discriminate Between Common Carriers and Other Corporations and Individuals..... 51

Submitted That Judgment of Circuit Court of Appeals Should Be Reversed and Judgment of District Court Affirmed.....53, 54

STATUTES REFERRED TO.

California Code of Civil Procedure, Sec. 377..... 36

New Mexico Statute, Sec. 1820.....5, 6

INDEX TO AUTHORITIES.

PAGE

Adams v. Fitchburg R. Co., 67 Vt. 76; 30 Atl. 687 ..... 13, 15, 28

Armbruster v. Ry. Co., 166 Ia. 155; 147 N. W. 337 ..... 15, 50

A. T. & S. F. v. Farrow, 6 Colo., 498 ..... 15, 51

Bank v. Remsen, 158 U. S. 337 ..... 15, 21, 46

Barnes v. Alexander, 232 U. S. 117 13

Bird v. Hayden, 1 Roberts (N. Y.) 383 ..... 13, 25

Bond v. United Railroads, 159 Cal. 270 ..... 14, 29

Boston, etc. R. v. Hurd, 108 Fed. 116 ..... 15, 48

Casey v. Ry. Co., 116 Mo. App. 235; 91 S. W. 419 ..... 15, 35

Chase v. Curtis, 113 U. S. 452 21

Christilly v. Warner, 87 Conn. 461; 88 Atl. 711 ..... 15, 44, 50

Clay v. Ry. Co., 228 S. W. 907 ..... 13, 15, 35, 43, 49

Cox v. T. & P. Ry. Co., 145 U. S. 593 .....

Dale v. Atchison, 57 Kan. 601; 47 Pac. 521 ..... 14, 35, 42, 49

Derrickson v. Smith, 27 N. J. L. 166 ..... 13, 25

Finney v. Guy, 189 U. S. 335 ..... 14, 26

Gallagher v. Ry. Co., 196 Fed. 1000 13

Grier v. K. C. R. Co., 228 S. W. (Mo.) 454 ..... 14, 23

Hill v. Boston, etc., R. Co., 77 N. H. 151; 89 Atl. 482 ..... 15, 49

Hopper v. Denver Etc. Ry. Co., 155 Fed. 273 ..... 13, 31

Huntington v. Attrill, 146 U. S. 657 ..... 15, 49

Ill. Cent. Ry. v. Ihlenberg, 75 Fed. 873 13

Ind. Etc. v. John, 5 Hammond (Ohio) 217 ..... 14, 24

In re: Estate of Riccomi, 185 Cal. 458; 197 Pac. 97 ..... 15, 30, 39, 52

Kramer v. Ry. Co., 25 Cal. 434 13

PAGE

Lange v. Schoettler, 115 Cal. 388.....14, 30, 36, 52
Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852 .....14, 20
Marshall v. Ry. Co., 46 Fed. 269.....15, 35, 41, 49
Matheson v. Ry. Co., 61 Kan. 667; 60th Pac. 747 .....15, 43, 49
McClain v. Ins. Co., 110 Fed. 80..... 13
McManus v. Canning Co., 37 Cal. App. 133.....13, 17
Minor on Conflict of Laws, Section 10.....14, 22
Mo. Pac. v. Ault, 256 U. S. 557.....15, 47
Moss v. Smith, 171 Cal. 777.....15, 45
No. Pac. Ry. Co. v. Hambly, 154 U. S. 349..... 13
O'Reilly v. N. Y. N. E. R. 16 R. I. 388; 17 Atl. 906 .....13, 14, 27
Parsons v. Easton, 184 Cal. 765.....14, 38, 52
Patterson v. Thompson, 86 Fed. 85.....15, 21, 46
Phoenix R. R. Co. v. Landis, 231 U. S. 578..... 13
Pickering v. Fisk, 6 Vt. 102.....14, 25
Powers *et al.* v. Sutherland Auto Stage Co., 213 Pac. (Cal.) 494.....15, 31, 39, 52
Pryor v. Payne, 244 S. W. 369.....14, 24
Raisor v. R. R. Co., 215 Ill. 47; 74 N. E. 69..... .....15, 35, 39, 50
Redfield v. Ry. Co., 110 Cal. 277.....14, 38, 52
Romero v. Ry. Co., 11 New Mexico, 579; 72 Pac. 37 .....13, 15, 33, 51
Ryan v. No. Alaska S. Co., 153 Cal. 438..... 13
Slater v. Mex. National Co., 194 U. S. 120.....15, 52
Spokane etc. v. Whitley, 237 U. S. 487..... 13
Story v. Green, 164 Cal. 768.....15, 52
St. L. Ry. Co. v. Seale, 229 U. S. 156..... 13
Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.....14, 20
Wilson v. Tootle, 55 Fed. 211..... 13

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 268.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Petitioner and Defendant in Error,

vs.

O. J. Nichols,
Plaintiff in Error.

Brief and Argument for Defendant in Error.

NOTE: Transcript references are to pages of printed Transcript of Record which accompanied Petition for Writ of Certiorari and which, by stipulation, constitutes the return to said writ.

STATEMENT OF THE CASE.

Nature of the Action.

The Atchison, Topeka and Santa Fe Railway Company, a corporation (hereinafter referred to as petitioner) seeks to have reviewed and re-

versed a judgment [Tr. 67; 286 Fed. 1] of the United States Circuit Court of Appeals for the Ninth Circuit (herinafter referred to as the Cirsuit Court of Appeals) which reversed a judgment [Tr. 49, 50] rendered by the United States District Court for the southern district of California, southern division (hereinafter referred to as the District Court) in favor of petitioner in an action brought against it by the plaintiff in error for the recovery of heavy damages for the alleged wrongful death of his wife.

Manifestly the action, as will hereinafter appear, was brought in California on the supposition that the laws of New Mexico permitted recovery of compensatory damages for wrongful death substantially the same as in California. But an examination into the laws of New Mexico disclosed the existence of a *special* statute creating a right to recover a forfeiture, not damages, from railroad companies and stage coach lines for the death of a passenger caused by negligence and that this statute gave the sole right in New Mexico to recover for the death of a person dying from injuries received by the carrier's negligence while a passenger on a railroad, stage coach, or other public conveyance.

The case involves, therefore, the enforcement in California or in a Federal Court sitting in that

state, of a statute of the state of New Mexico, copied from a statute of Missouri, which created a special action against public carriers alone in favor of certain specified persons whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance; and which statute declared that for every passenger dying from an injury resulting from or occasioned by any defect or any insufficiency in any such railroad locomotive, stage coach or other public conveyance, the corporation or public carrier should *forfeit and pay* for every such person and passenger so killed, the sum of Five Thousand (5000) Dollars.

Statute Involved.

The statute upon which the decision of the Circuit Court of Appeals rests is Section 1820 of the New Mexico Annotated Statutes of 1915. That statute is also contained in the compiled laws of New Mexico of 1884 as section 2308 and in the compiled laws of the later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal in-

tent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage coach or other public conveyance, the corporation, individual or individuals in whose employe any such officer, agent, servant, employe, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered. First, by the husband or wife of the deceased, or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

Petitioner was at all the times here involved, a corporation engaged in the operation of a steam railroad from California to Chicago operating regular passenger trains for the transportation of persons for hire. In June, 1920, Mary J. Nichols, wife of the plaintiff in error, was a passenger on one of these trains; and when passing through the state of New Mexico, she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

The plaintiff in error, in his individual capacity, brought an action against petitioner in the Superior Court of the state of California in and for the county of Los Angeles, for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000; in the loss of her society, love and affection, in the sum of $20,000, and further damaged in the amount of $586.42 for expenses incident to the last illness and funeral expenses of his wife, for railroad fare and various other specified expenses.

Petitioner, the defendant in said action, within the time allowed by law, asked for and secured the removal of said action into said District Court on the ground of diversity of citizenship, where the case was tried by the

court without the intervention of a jury, a jury having been waived by the written stipulation of the parties. Judgment was entered for petitioner on findings and conclusions. [Tr. 49, 50.]

Plaintiff in error, by proceedings in error, thereafter caused the record, proceedings and judgment to be submitted to and reviewed by the Circuit Court of Appeals upon the errors there assigned and urged [Tr. 52, 53].

The assignment of errors raised really but one question, namely: whether judgment should have been entered for petitioner or should have been entered for plaintiff in error for $5000.

At the time when said action was commenced and during all of the times herein mentioned, the sole recovery allowed by the laws of New Mexico against a common carrier for the death of a passenger resulting from or occasioned by the negligent operation or by any defect or insufficiency of any railroad or any part thereof, or in any locomotive was and is that given by said Section 1820 of the New Mexico Annotated Statutes of 1915, copied at page 5 hereof.

View of the Circuit Court of Appeals.

The Circuit Court of Appeals, by its opinion (286 Fed. 1) on the authority, principally of Huntington v. Attrill, 146 U. S. 657, reversed the District Court holding that said Section

1820 of the New Mexico state was non-penal in the international sense, and would be enforced in said cause and court for the benefit of the plaintiff in error [Tr. 67-75] and entered judgment reversing the judgment of the District Court in said cause and remanded the cause to said District Court with directions to enter judgment in favor of plaintiff in error for $5000 with costs. [Tr. 75, 76.]

The Circuit Court of Appeals thereafter denied an application for a re-hearing of said cause, properly and timely interposed by petitioner, and, its decision being reviewable only by certiorari, petitioner applied to this court for the writ which was issued herein. It having been stipulated that the record which accompanied the petition may be considered as a return to the writ of certiorari, the judgment so rendered by the Circuit Court of Appeals is now before this court for review, pursuant to the provisions of Section 240 of the Judicial Code upon the following:

Points and Specification of Errors Relied Upon.

First: No civil action for death of a human being exists at common law. It is wholly the creature of statute. If no survival is wrought by statute, the action must abate.

Second: If a right of action is given by statute (not of a penal nature) of the state in which the injury and death occurred, the right may be enforced in any tribunal having jurisdiction over the defendant, provided always such statute is not opposed to the *lex fori.*

Third: The decision of the Circuit Court of Appeals erroneously enforces and administers a penal statute outside the state to which it belongs or other than the state in which enacted.

Fourth: The decision of the Circuit Court of Appeals erroneously enforces a foreign statute in a jurisdiction (California) where such statute is obviously in conflict with and opposed to the spirit and policy of the laws thereof.

Fifth: Plaintiff in error has no remedy in this action except under Section 1820 of the Laws of New Mexico, Ed. of 1915, which statute undertakes to create new and extraordinary civil liability upon common carriers alone for the wrongful death of a passenger, wherein and whereby the element of punishment clearly predominates, by compelling the payment by the common carrier of a forfeit of $5000, no less nor more, regardless of damages, whereas, it is the settled law of California, binding alike on all of the courts both state and federal sitting therein, to determine the amount of damages in all cases and against all wrong-doers, be they

individuals, corporations or common carriers (when the death of a person is caused by wrongful act) according to the evidence of pecuniary loss, and which damages shall be strictly compensatory, for such pecuniary loss as proved.

Sixth: A statute like the one in New Mexico, which authorizes a recovery without any showing of damages, is not one for the recovery of damages.

Seventh: The decision and judgment of the Circuit Court of Appeals directing the District Court to enter judgment in favor of the plaintiff in error, [Tr. 75, 76] thereby enforcing in California said New Mexico statute, are predicated upon the erroneous assumption that the instant case is ruled by the doctrine of Huntington v. Attrill, 146 U. S. 657.

Eighth: The decision of the Circuit Court of Appeals in the instant case is in conflict with the Federal Court in Ohio and the Supreme Courts of the states of Illinois, Iowa and Kansas, in that in every instance where either the New Mexico statute here in question or the like statute of Missouri had been attempted to be used as a basis of an action in another state, recovery has been refused.

Ninth: The decision of the Circuit Court of Appeals is in conflict with the Federal Court

sitting in Colorado and with the decisions of the highest courts of many of the states refusing recovery in actions based upon foreign statutes substantially the same as the New Mexico statute.

BRIEF OF THE ARGUMENT.

I.

The decision and opinion of the Circuit Court of Appeals is set out at pages 67 to 75, both inclusive, of the transcript.

The basic rule of law applicable in this case is stated in the opinion of the Circuit Court of Appeals in accordance with the contention of petitioner and the ruling of the District Court as follows:

> "The defendant in error having removed the action from the court of the state in which it is brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rules that would have controlled it had it not been so removed. It was so held in effect by this court in the case of N. P. Ry. Co. v. Kempton, 138 Fed. 992, 998, 999. See also, Spokane Inland E. Rd. v. Whitley, 237 U. S. 487, and cases there cited." [Tr. 68, 69.]

II.

Under the law of the forum—the law of California—the right to recover for death resulting from injuries incurred as a passenger

on a railroad train in New Mexico is only that given by said Section 1820 of the laws of New Mexico and there can be no recovery, except such as is allowed by that statute:

McManus v. Canning Co., 37 Cal. App. 133;

Ryan v. No. Alaska S. Co., 153 Cal. 438;

Spokane v. Whitley, 237 U. S. 487;

Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;

Clay v. Ry. Co., Texas, 228 S. W. 907;

Phoenix R. R. v. Landis, 231 U. S. 578;

Adams v. Fitchburg R. R. Co., 67 Vt. 76, 30 Atl. 687;

Barnes v. Alexander, 232 U. S. 117;

Northern Pacific v. Hambly, 154 U. S. 349;

O'Reilly v. N. Y. N. E. R., 16 R. I. 388; 17 Atl. 906;

St. Louis Ry. Co. v. Seale, 229 U. S. 156;

Kramer v. Ry. Co., 25 Cal. 434;

Gallagher v. Ry. Co., 196 Fed. 1000;

McClain v. Ins. Co., 110 Fed. 80 (91);

Ill. Cent. v. Ihlenberg, 75 Fed. 873;

Wilson v. Tootle, 55 Fed. 211;

Hopper v. Denver etc., R. Co., 155 Fed. 273;

Derrickson v. Smith, 27 N. J. L. 166;

Bird v. Hayden, 1 Robertson, N. Y., 383;

Pickering v. Fisk, 6 Vt. 102;

Ind. Etc. v. John *et al.*, 5 Hammond (Ohio), 217;

Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839;

Minor on Conflict of Laws, section 10;

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Grier v. Kansas City Etc. Ry. Co., 228 S. W. R. (Mo.) 454;

Pryor v. Payne, 244 S. W. R. (Springfield Court of Appeals Mo.), 369.

Treadway vs. United Railways Co. of St L
III. 253 S. W. Rep. p 1037

There can be no recovery in California either in the state or federal court under section 1820 of the New Mexico statutes because the policy of that statute is opposed to the policy of the state of California.

Lange v. Schoettler, 115 Cal. 388;

Bond v. United Railroads, 159 Cal. 270;

Redfield v. Ry. Co., 110 Cal. 277;

Parsons v. Easton, 184 Cal. 765;

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

O'Reilly v. N. Y. & N. E. R., 16 R. I. 388, 17 Atl. 906;

Adams v. Fitchburg R. R. Co., 67 Vt. 76, 30 Atl. 687;
Slater v. Mex. Nat. Co., 194 U. S. 120;
Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747;
Christilly v. Warner, 87 Conn. 461, 88 Atl. 711;
Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Marshall v. Ry., 46 Fed. 269;
Clay v. Ry. (Tex.), 228 S. W. 907;
Casey v. Ry. 116 Mo. App. 235, 91 S. W. 419;
Huntington v. Attrill, 146 U. S. 657;
Moss v. Smith, 171 Cal. 777;
Patterson v. Thompson, 86 Fed. 85;
Bank v. Remsen, 158 U. S. 337;
Mo. Pacific v. Ault, 256 U. S. 557;
Boston Etc. v. Hurd, 108 Fed. 116;
Hill v. Boston, Etc., 77 N. H. 151, 89 Atl. 482;
Armbruster v. Ry., 166 Iowa 155, 147
A. T. & S. F. v. Farrow, 6 Colo. 498;
Story v. Green, 164 Cal. 768;
Powers, *et al.*, v. Sutherland Auto Stage Co., 213 Pac. (Cal.) 494;
In re: Estate of Riccomi, 185 Cal. 458, 197 Pac. 97.

ARGUMENT.

I.

The said Circuit Court of Appeals, in accordance with petitioner's contention and the ruling of the District Court, having held that the case is governed by the rule that would have controlled it had it not been removed into the Federal Court and having also held that plaintiff can recover in this action, if at all, under section 1820 only, of said New Mexico statute, we suggest what we conceive to be the sole question in this case, namely:

Could or could not the plaintiff in error in this case have recovered in the state court had the case not been removed to the federal court?

The opinion of the Circuit Court of Appeals proceeds, we respectfully submit, upon the assumption that plaintiff in error could have recovered in the state of California unless the New Mexico statute is to be regarded as penal.

But we respectfully submit that to determine the New Mexico statute non-penal is not an answer to the question whether the plaintiff could have recovered in the state court of California.

For state courts have frequently refused a recovery upon a foreign statute, not on the ground that the foreign statute was penal, but on the ground that the foreign statute declared

a policy of law inconsistent with the policy of the forum in which the suit was brought.

This is illustrated in the case of McManus v. Canning Co., 37 Cal App. 133, where the court said:

> "Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska is contrary to the policy of the law of California and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the compiled laws of Alaska of 1913, codified by authority of the Act of Congress of August 24, 1912, chapter 387, section 19, 37 Stats. 518, and chapter 45 of the Session Laws of the Territory of Alaska, for 1913, approved April 3, 1913."

The court then quotes the statutes of Alaska and proceeds at the bottom of page 136:

> "It is settled law that an action for wrongful death like other actions on tort is governed by the law of the jurisdiction where the tort was committed, and as it is a transitory action it may be maintained in any jurisdiction where the defendant is found (citing cases) *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the express provisions or the general policy of the law* of its own jurisdiction. (Citing authority.)"

Then after discussing the meaning of the Alaska statute, section 1185, the court says, re-

ferring to a decision of said Ninth Circuit Court of Appeals:

> "It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death upon the personal representative of the decedent for the benefit of the estate and that any damages recovered become assets of the estate to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any, and in default of heirs the state takes by escheat. We fully agree with counsel for respondent that this right of action created by section 1185 is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely that the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of said aid.
>
> "Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make

> a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby."

There was in the foregoing case of McManus no question of a penal statute, but solely a question of a difference in policy, and while the courts of California have not been called upon to determine the consistency or inconsistency of the policy of California with the policy of the New Mexico statute, certainly the New Mexico statute is much further removed in policy from the law of California and the policy of California than was the Alaska statute under which the California court held that no recovery could be had in that state.

To the point that the policy of the New Mexico statute is opposed to the established policy of the state of California we invite attention to the fact that the New Mexico statute, or the same statute of Missouri, has been the ground of action in Kansas, in Texas, in Illinois, in Iowa, and while some of the cases have spoken of the statute as penal, yet they have also declared that the policy of the statute is at variance with the policy of the forum and in every case have refused a recovery. What possible ground is there for assuming that California would be the one only state to allow recovery under the New Mexico statute?

As "death statutes" have been almost universally enacted, the discussion of "policy" usually turns on the extent of similarity between the local and foreign enactments.

If a right of action is given by a statute (not of a penal nature) of the state in which the injury and death occurred, the right may be enforced in any tribunal having jurisdiction over the defendant, *provided*, of course, that a substantially similar statute exists in the state of the tribunal. We do not claim that it is essential that the statute be precisely the same, but if it is of similar import and character it will suffice.

This, we understand, is the ruling in:

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

Without discussing in detail the questions of the similarity and dissimilarity of the various statutes involved in the many decisions on this subject, it is enough to say that where the foreign statutes were enforced, there was no substantial dissimilarity between the statutes involved and those of the forum. But in every case where either the Missouri or New Mexico statute was sought to be enforced or administered in a state other than that in which

enacted, the state tribunals refused to administer or enforce either of said statutes upon the ground that such statutes were opposed to the *lex fori*.

II.

The Policy of Section 1820 of the Statutes of New Mexico Is Opposed to the Policy of the State of California and It Is Submitted That There Is Nothing in the Case of Huntington v. Attrill, 146 U. S. 657, That Is Authority for the Enforcement in California of Said Section of the New Mexico Statute.

The Circuit Court of Appeals rests its opinion on the theory that the instant case is ruled by the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. Really the decision was based upon a consideration of the remedial provision of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;

National Park Bank v. Remsen, 158 U. S. 337;

Chase v. Curtis, 113 U. S. 452.

In the footnotes to section 10 of Minor on Conflict of Laws, may be found an illuminating discussion of the case of Huntington v. Attrill, 146 U. S. 657. The author points out that it was not necessary to a decision in that case to decide whether the New York statute was penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The pertinent observations of the author are those respecting the enforcement of the foreign statute under rules of private international law and international comity. We quote what is there said because it is so peculiarly applicable to the situation here:

> "But in private international law, the ground of the enforcement of a foreign law is international comity, which is nothing more than the enlightened sentiment that exact justice may be meted out by requiring that a man's acts should be governed by the law under which he acts, provided the enforcement of that law will not conduce to injustice nor affect the interests of the forum. But if to hold a wrongdoer liable in double or treble damages to the party injured is not punishment to the former, it is certainly more than justice to the latter. *Justice* to him is satisfied by *compensatory* damages. Hence the forum, in endeavoring to mete out exact justice to the parties by enforcing a foreign law rather than its own, will find itself, under this view rendering to the injured party more than justice re-

> quires, and at the expense of the other litigant. He has a right to demand this under the *municipal* law, not because of justice, but because the positive law requires or permits it. But where he seeks to enforce his claim in another state, what right has he to ask this of the forum whose policy may be entirely different?"

So in the instant case, if the plaintiff were suing under California law for damages for alleged wrongful death in the courts of that state, he would be limited to the pecuniary loss suffered, as disclosed by the evidence, whereas, by invoking and seeking to enforce the provisions of the New Mexico law, assuming that actionable negligence has been shown, he recovers the arbitrary sum of $5000.00, regardless of damages.

Prior to 1905 the Missouri statute read, so far as material here,

> "shall forfeit and pay the sum of $5000."

In 1905 this statute was amended so as to read,

> "* * * shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury, which may be sued for and recovered * * * by,"

In the case of Grier v. Kansas City etc. Ry. Co. (228 S. W. R. 454), the Supreme Court

of Missouri held that this statute was penal as to all amounts that might be recovered thereunder, and that it was in no sense compensatory as to sums exceeding $2000.00; the legislative purpose being to allow the jury to assess the punishment in accordance with the negligence and the loss.

Accordingly, the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne (244 S. W. R. 369) held that there could be no recovery under this statute for the death of a traveler on a highway crossed by the railroad, against the Director General of Railroads because of any neglect in the operation of railroad trains, since such statute is purely penal and in no sense compensatory.

The case of The State of Indiana for the use of Cone v. John *et al.*, 5 Hammond (Ohio) 217, was an action on an official bond prescribed by the laws of Indiana and which allowed recovery to anyone injured by official default, to treble damages, full costs and charges. The Ohio court refused to enforce the remedy and said:

> "A state can enforce its contracts in our courts, the same as an individual suitor; but the remedy must be afforded according to our laws and practice."

Derrickson v. Smith, 27 N. J. L. 166:

Was an action in the New Jersey Circuit Court founded upon a staute of New York requiring corporations to file and publish annual reports, showing the condition of their affairs; a failure to file and publish such reports made the trustees jointly and severally liable for all debts then existing.

It was held that this statute could not be enforced in New Jersey because it was in the nature of a penalty for official neglect of duty.

Bird v. Hayden, 1 Robertson, N. Y. 383:

In that case it was held that personal liability imposed by Massachusetts statute upon the officers of a corporation who neglected or refused the performance of a duty, with which they were charged by the statute, was in the nature of a penalty, and designed as punishment for such neglect, and the New York court refused to enforce the statute.

Pickering v. Fisk, 6 Vt. 102:

Involved an action on a sheriff's bond executed in the state of New Hampshire for the public security and which provided that an action might be brought thereon for the benefit of anyone injured by official default. The Vermont court refused to entertain an action

against the sheriff and his bondsmen, giving as reasons therefor that:

> 'no sovereign state is bound by the laws of another, nor can the laws of another state operate *proprio vigore* within it. The observance of foreign laws rests in comity and convenience, and is a disposition of courts to adapt their proceedings to the great ends of justice. But there is a limit to this principle of comity; and cases may and do arise, where the observance of foreign laws would neither be convenient, nor answer the purposes of justice. Foreign laws, therefore, are not regarded, where they are irreconcilable with our own regulations, nor where, in our opinion, they conflict with our established policy."

Finney v. Guy, 189 U. S. 335:

This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation in Minnesota and doing business in that state. A demurrer was interposed to the complaint. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the state. The case was taken to this Honoroble Court by the plaintiff to review the judgment of reversal. Under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations was a suit

in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who could be served with process. This Honorable Court held that the courts of Wisconsin did not deny full faith and credit to a judgment of the Minnesota court against resident stockholders by denying the right to maintain a further action to enforce such liability outside the state. This court further said:

> "Whether, aside from the federal considerations just discussed the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a federal nature, and we cannot supervise the action of the Wisconsin court in this particular. The judgment of the Supreme Court of Wisconsin must be affirmed."

In *O'Reilly v. N. Y. & N. E. R. Co.*, 16 R. I. 388, 17, Atl. 906, the head note reads:

> 2. "Pub. St. Mass. c 112, par. 213, provides that if a person is injured by collision with the engine or cars of a railroad corporation at a grade crossing, and the neglect of the corporation to give the signals required by law has contributed to the injury, the corporation shall be liable, in case of death of the party injured, to damages, recoverable by the executor or administrator of the deceased in an action of

tort, as provided in Sec. 212, unless it is shown that, in addition to a mere want of ordinary care, the deceased was guilty of gross or wilful negligence, etc. Sec. 212 provides, that, where the life of a person is lost through the carelessness of such a corporation, it may be punished by fine or indictment, or sued for damages in an action of tort, the fine imposed or the damages recovered to be not less than $500 nor more than $5000; damages, in case the corporation is civilly prosecuted to be assessed with reference to the degree of culpability of the corporation. Held, that the liability imposed by such statute was penal, and that an action could not be maintained under it in Rhode Island, whose statutes, making railroad companies liable for negligence resulting in death, have none of the penal features of the Massachusetts statute."

The opinion sustains the head note in every particular. The court refers to Dennick v. Railroad Co., 103 U. S. 11; Leonard v. Navigation Co., 84 N. Y. 48; Stoeckman v. Railroad Co., 15 Mo. App. 505 and points out that the liability in question in each of said three cases was remedial, not penal; the rule of liability being no more exacting than it would have been in favor of the deceased, if he had survived and the damages recoverable being *recoverable as compensation.*

In the case of *Adams v. Fitchburg R. Co.*, 67 Vt. 76, 30 Atl. 687, this same Massachusetts

statute was made the basis of recovery, but the Vermont court held that it was a penal statute and hence an action thereunder could not be brought in another state. In considering the Massachusetts statute, the court said:

> "The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right-of-action to the personal representative of the deceased for the benefit of the widow and children, or widow, and next of kin. If the right of recovery is established, the damages are to be $500 in any event. Any recovery beyond this is to be assessed with reference to the degree of the defendan't culpability. It appears, then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained * * * The wrongdoer is to be punished, whether the person receiving the amount of the recovery has sustained a substantial injury or not."

The court further said, that a statute may be penal, although the entire amount recovered be given directly to the party injured.

Under the law of California "the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

Bond v. United Railways, 159 Cal. 277.

Nor can exemplary damages be awarded even if the act causing death was wanton, since section 377 of the California Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived.

Hence, only such damages can be recovered as the statute authorizes, and cannot include any grievance personal to the deceased nor any "damage allowed in the interests of the people as punishment."

Lange v. Schoettler, 115 Cal. 388.

In the Estate of Riccomi, 185 Cal. 458, the court in considering section 377 of the Code of Civil Procedure of that state and the settled construction of the statute and its purpose and object, said:

> "It is settled that the action authorized by the section is one *solely* for the benefit of the heirs by which *they may be compensated for the pecuniary loss suffered by them* by reason of the loss of their relative."

Further along the court reiterates:

> "In this case the important thing to bear in mind is that the action 'for damages' for the benefit of the 'heirs' is one solely for the *purpose of compensating them for the pecuniary loss suffered by them* by reason of the death of the deceased. An examination of the decisions involving questions of

> the elements of damage to be considered in such cases demonstrates this: While there can be but one action brought or one recovery had either by the personal representative of the deceased or the heirs (see Daubert v. Western Meat Co., 139 Cal. 480; [96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244]), and while the recovery in such an action should be of a single 'lump sum' for all (see Robinson, *et al* v. West. States, etc. Co., 184 Cal. 401 [194 Pac. 39]), the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased. As put in Robinson v. Western States, etc. Co., *supra*, this 'lump sum' includes 'of course, the damages to each of them' * * * It follows inevitably, that there can be no substantial recovery on account of any heir who has not suffered substantial pecuniary injury."

In *Powers, et al v. Sutherland Auto Stage Co., et al*, 213 Pac. (Cal.) 494, the court said:

> "It is well settled in California that the only damages recoverable by heirs under Sec. 377 of the Code of Civil Procedure, are compensatory damages 'for the pecuniary loss to them by reason of his death,'" citing, Estate of Riccomi, *supra*.

In the case of Hopper v. Denver, etc., R. Co., 155 Fed. (Eighth C. C. A.) 273, the court had under consideration a Colorado statute which created an action for death negligently caused by a public carrier and which statute

declared that every such public carrier should forfeit for every person and passenger, so injured or killed, not more than $5000.00 nor less than $3000.00. The question of the validity of that statute was left open and the court also passed, without deciding, whether the statute, if valid, could be enforced outside of the state court of Colorado. Judge (now Mr. Justice) Van Devanter, speaking for the court, made this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 246, 57 Am. Rep. 382; Marshall v. Wabash R. Co. (C. C.), 46 Fed. 269; Dale v. Atchison etc. Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City etc. Co., 61 Kan. 667, 60 Pac. 747; Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Brady v. Daly, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; Boston & Maine R. R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; McCabe v.

American Woolen Co. (C. C.), 124 Fed 283; s. c. 65 C. C. A. 59, 132 Fed. 1006; Malloy v. American Hide & Leather Co. (C. C.), 148 Fed. 482, Wharton's Conflict of Laws (3d Ed.), Secs. 4b, 480a; Atlanta v. Chattanooga Foundry, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241; Johnson v. Southern Pac. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363.)"

If the enforcement of the Colorado statute in a federal court, sitting in that state, was a question of serious doubt, obviously, it ought to be decisive of the proposition that the New Mexico statute here involved cannot be enforced or administered in California or in a federal court sitting in that state, and that the New Mexico statute can be enforced or administered, if at all, in the state of New Mexico only.

III.

Under the New Mexico Statute, if the Plaintiff Recover He Will Recover Five Thousand Dollars, Neither Less Nor More, Regardless of Damages.

In the case of *Romero v. Atchison, Topeka & Santa Fe Ry Co.*, 11 N. M. 677, 72 Pac. 37, the court, after drawing attention to the statute here under consideration being in derogation of the common law and that such statute was bor-

rowed from the state of Missouri, and after stressing the point that the Supreme Court of Missouri had construed the statute as creating the right itself to recover for the death of a passenger, said:

> "In this case the complaint charges that Leyba was killed by the negligence of the employes of the defendant company, a common-carrier, and this is not denied. If, therefore, a right of recovery existed at the time of the occurrence, it was clearly under section 3213, Comp. Laws of 1897—the only section relating to such cases. Counsel for appellant, in his ingenious brief, and also in his oral argument, insisted that in such case a suit might be maintained under section 3213 by one of the persons authorized by that section, and a second suit be maintained at the same time for the same cause of action by the representatives of the deceased, under sections 3214 and 3215, but it appears to us that the mind of the learned counsel is more prolific of remedies than the statute. But, however, that may be, the contention is repugnant to what we conceive to be the plain meaning of the statute, as it is incomprehensible that the legislature should intend to provide a double remedy in damages for one and the same injury, and between practically the same parties. If, then, the remedy in this case existed under the terms of section 3213, the suit could not be brought by the administrator or other representative of the deceased, but must be brought by one of those persons specifically authorized to sue. There was

an absolute want of authority in the plaintiff to sue in a representative capacity, as that section excludes representatives by omitting them and specifically designating others. This objection to the complaint was raised by the demurrer, and, as it was not alleged that the plaintiff was one of the persons authorized by that section to sue a common carrier, the complaint was clearly obnoxious to the demurrer, and the court properly sustained the same.

The plaintiff electing to stand by his complaint, the court rendered judgment for the defendant, dismissing the cause at plaintiff's costs. There was no error in this action of the court, and the judgment of the court below will be affirmed, with costs, and it is so ordered."

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Marshall v. Wabash, 46 Fed. 269;

Clay v. Ry. Co. (Tex.), 228 S. W. 907.

He recovers this amount without proof of damage, with no opportunity afforded the defendant to show that no damage has resulted

Casey v. St. Louis Etc., 116 Mo. App. 235, 91 S. W. 419;

Raisor v. Chicago Etc., 215 Ill. 47, 74 N. E. 69.

But the policy of California is that the amount of the damages in such cases shall be determined according to the evidence of pe-

cuniary loss and that they shall be strictly compensatory for the pecuniary loss as proved.

A statute like the one in New Mexico, which authorizes recovery without any showing of damages can hardly be called one for the recovery of damages.

Section 377, California Code of Civil Procedure, reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other persons. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

It will be observed that this statute has none of the penal features of the New Mexico statute, and does not discriminate between common carriers and other corporations and individuals.

This statute has, as hereinbefore noted, been under consideration in the courts of California many times. Thus in the case of Lange v. Schottler, 115 California 388, Mr. Justice Temple, writing the opinion of the court, said:

> "The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary

damages, if the act causing death was wanton, cruel and malicious. I think this instruction erroneous and that it was probably given under much misapprehension as to our statutes upon the subject. It has been uniformly ruled that the action provided for in section 376 of the Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes and in the absence of an express provision authorizing a different rule the only damage allowed is for the probable value of the life to those in whose behalf the action is brought. Of course this cannot include any grievance personal to the deceased or any *damage allowed in the interest of the people as punishment.*

* * * * * * * *

"The statute of 1862 expressly allowed the jury to give exemplary damages, and this provision was carried into the first editions of the codes. It authorized such damages 'pecuniary and exemplary' as the jury should deem just. In 1874, section 377 was amended by striking out the words 'pecuniary and exemplary.' The purpose of this amendment must have been to take away the right to exemplary damages and to make the rule accord with the general rule elsewhere.

"The decisions upon this matter are cited and discussed in Munro v. Pacific Co., 84 Cal. 515. In that case, while holding that in the case of a wife or mother, suing under the statute the jury may take into consideration the loss of the comfort, society and protection of the deceased, yet

the remark of Mr. Justice Wills that the subject matter of the statute is compensation for injury by reason of the deceased not being alive, is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relative. In the same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow, grief, etc., of the mother. Instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss."

In Redfield v. Oakland Ry., Etc., 110 Cal. 277, the opinion said it is contended by appellant that so many states have determined that it is wise to limit the amount that can be recovered as damages in cases like the present that we should look to such limits in determining the amount to be recovered and be governed thereby; but such statutes were in existence long before section 377 of the Code of Civil Procedure was enacted, and this provision of the code is a direct *determination of our Legislature that the policy adopted by other states in that regard should not exist here.*

In Parsons v. Easton, 184 Cal. 765, opinion by Justice Shaw, at page 770, he quotes from Bond v. United Railways, 159 Cal. 277:

"The damages are limited to the pecuniary loss suffered by the person or per-

> sons for whose benefit the right of action is given, from the death or injury of the victim."

In Parson's case, above cited, a verdict of $6000.00 was held to be clearly greater than the evidence warranted for the death of a son 27½ years of age, who had been at times insane, and who was somewhat deformed.

See also:

Estate of Riccomi, supra;

Powers, et al, v. Sutherland Auto Stage Co., supra.

The courts of California have not been asked to enforce this statute of New Mexico, but the courts of other states having the same policy that California has concerning measure of damages, have repeatedly refused to allow recovery under the New Mexico statute or under the statute of Missouri from which the New Mexico statute was copied.

In Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69, the court, after discussing the statute of Missouri, which was the same as the statute of New Mexico, said near the close of the opinion:

> "Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect

to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained. (Citing cases.) In 1845 the Legislature adopted as the law of this state the common law of England and all statutes or acts of the British Parliament made in aid thereof and to supply the defects of the common law prior to the 4th year of James the First. This includes the common law forms of action, *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto* or in any action sounding in damages cannot recover substantial damages without proof that he has suffered some. Two elements must concur to entitle the plaintiff to recover substantial damages—injury and actual damages—and these two must be proved. On proof of injury alone nominal damages may be recovered, as the law presumes some damage on proof of injury. But there can be no recovery of actual or substantial damage in the absence of proof thereof. But the Legislature has expressed itself with regard to the very subject matter of the present suit, namely the death of a person caused by wrongful act, neglect or default. In such case an action may be brought in the name of the personal representative of the deceased for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to

> the wife and next of kin of such deceased person, not exceeding $10,000.' (Citing the statute.) Our statute is substantially a copy of the first two sections of 9 and 10 Victoria, chapter 93, and of the New York statutes on the same subject, and it has been held in England, New York and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages and that when there has been no pecuniary loss there can be no recovery. (Citing cases.) It is therefore as we think contrary to the policy of this state as evidenced by the acts of the Legislature to permit a recovery for damages on mere proof of neglect or default of the defendant and without proof that the plaintiff has suffered any pecuniary loss."

In Marshall v. Wabash, 46 Fed. 269, in considering the same Missouri statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely and not penal."

Judge Sage makes this very pertinent comment:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may

> for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitrary, inflexible rule, would be in conflict with the constitutional right of the defendant to a jury trial."

The New Mexico statute itself came before the court of Kansas in Dale v. Atchison, 57 Kas. 601, 47 Pac. 521, the court saying that it was the same in substance as the Missouri statute which had been under consideration in Hamilton v. Ry., 39 Kas. 56, 18 Pac. 57; that it had been held by the courts of Missouri that the recovery must be for the full amount and nothing less, and that a verdict for half the amount, or $2500.00, would be set aside by the court, and adds:

> "Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico, although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow or minor children and that they are the ones usually, if not invariably, the most injured by his death, and that the money to be paid under that statute subserved really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of husband and father, it is ap-

> parent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family, contributing nothing to them."

And the court felt constrained to hold "that the courts of this state will not undertake the enforcement of a statute penal in part and *so dissimilar in principle from the law of our own state.*"

In Clay v. Ry. Co. (Tex.), 228 S. W. 907, the court remarked that the recovery provided for by section 1820 of the statute of New Mexico is inflexible and is aimed at the culpability of employes of the railway company rather than based upon the extent of injury, thus partaking more of the nature of a penalty than of a right created.

Mattheson v. Kansas City, Etc., Ry. Co., 61 Kansas 667, 60 Pacific 747, involved the statute of Missouri to which reference has already been made in this brief. The court referred to the Dale case, already cited, and adds that an arbitrary award of a fixed amount of damages regardless of pecuniary loss sustained is antagonistic to the policy of Kansas, and is palpably inconsistent with the Kansas statute authorizing a recovery in such cases, where the

plaintiff must show a pecuniary loss and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered. The court further said:

> "There have been a number of such cases, an illustration of which can be found in Railroad Company v. Weber, 33 Kansas 543, 6 Pacific 877, where the jury especially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary forfeiture of $5000 in such a case arising under the Missouri statute would be peculiarly punitive, and the fact that the penalty was bestowed on relatives of the deceased would not take away the penal character of the award. It is contended that the statute is not penal and cannot be so regarded, unless the penalty is paid to the state as a punishment for the wrong committed. In a strict and limited sense, a penal statute is one imposing punishment for an offense committed against the state, but we think this altogether too narrow and restricted a view to take of statutes like the one under consideration."

Christilly v. Warner, 87 Conn. 461, 88 Atlantic 711, was an action brought in the state court of Connecticut to recover for wrongful death suffered in Massachusetts. The court lays down certain general principles and discusses the Massachusetts statute as it gradually de-

veloped into its present form (which permits a recovery of not less than $500 or more than $10,000, to be assessed with reference to the degree of defendant's culpability or that of his agents or servants), and then said:

> "We have never allowed a recovery in a case of a negligent death upon any theory save that upon just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law."

Some of these opinions characterize the New Mexico and Missouri statutes as "penal." It is not penal according to the strict use of that term as explained and elaborated in Huntington v. Attrill, 146 U. S. 657. But the New Mexico statute is penal in the common use of the term; that is, it imposes a penalty.

In Moss v. Smith, 171 Cal. 777 (784) it is said:

> "Huntington v. Attrill, 146 U. S. 657, upon which appellants rely as supporting their contention that section 309 is a remedial and not a penal statute is explained by Judge Gilbert in Patterson v. Thompson, 86 Fed. 85, who shows that the question before the Supreme Court was solely whether such statutes were penal law in the sense in which the word is used in international law."

The same statute that was under consideration in Huntington v. Attrill was again before this Honorable Court in International Park Bank v. Remsen, 158 U. S. 337, and it was distinctly declared to be in its nature a penal statute as had previously been held in Chase v. Curtis, 113 U. S. 452.

In Patterson v. Thompson, 86 Fed. 85, involving the personal liability under the Oregon statute of a director in a saving bank, it is said (p. 87):

> "Counsel for plaintiff contended that by the decision in Huntington v. Attrill, 146 U. S. 657, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S. 337, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not a penal law in the international sense."

National Park Bank v. Remsen, 158 U. S. 337; opinion by Justice Brewer; suit for re-

covery under New York statute for failure of directors to make report (page 342), the opinion says:

> "That this statute is one of a penal character is settled, not merely by various decisions of the court of appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S. 452, though as since held not a penal law in the international sense. Huntington v. Attrill, 146 U. S. 657."

Mo. Pac. v. Ault, 256 U. S. 554, was a suit to recover wages under a statute of Arkansas providing that if a railroad company should discharge an employe it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employe should continue at the same rate until paid. In the lower court Ault recovered $50.00, his wages up to the time of discharge and $390.00, wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of a punishment; that the Supreme Court of Arkansas had held that it was not technically a penalty, but was allowed for a double purpose, namely as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

And that the judgment against the director general so far as it provided for recovery of the *penalty* was erroneous.

But the principle underlying all the opinions which we have cited, denying recovery of arbitrary amounts fixed by the law of another state, is really that those statutes are contrary to the policy of the forum. If the law of the forum gave similar right, the court would sustain a complaint under the foreign law.

It is also true that the doctrine of Huntington v. Attrill requires a court of California to permit recovery upon a judgment recovered in another state, although that judgment was obtained on a complaint which would not be held to state a cause of action in California. For instance, if a plaintiff recovers judgment in Louisiana on a gambling contract, he may sue on that judgment in California and recover, although he could not have recovered here on the contract itself. He must still reduce his demand, whatever it be, to judgment in a court of some jurisdiction whose policy permits recovery on such a demand. Thus the federal court sitting in New Hampshire will entertain an action on the Massachusetts statute, giving a recovery of damages for wrongful death and not measuring the damages by the rule of compensation.

Boston, Etc. v. Hurd, 108 Fed. 116.

That accords with the policy of New Hampshire.

Hill v. Boston etc., 77 N. H. 151, 89 Atl. 482.

The case of Huntington v. Attrill was decided in 1892, thirty-one years ago; and ever since then the courts, both state and federal, have gone on as before enforcing the policy of the *lex fori* and uniformly refusing judgment contrary to that policy; with the single exception that in a suit on a judgment obtained in a sister state on due process of law in an action not strictly penal, the respective policies of the two states cannot be considered.

Before the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery in the federal court in Ohio:

Marshall v. Ry. Co., 46 Fed. 269;

and since that decision in the state courts of Texas:

Clay v. Ry. (Tex.), 228 S. W. 907.

Kansas:

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747.

Iowa:

Armbruster v. Ry. Co., 166 Iowa 155, 147 N. W. 337.

Illinois:

Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

And in every instance where either of these statutes has been made the basis of an action in another state, either before or since the case of Huntington v. Attrill, recovery has been refused.

A similar case is

Christilly v. Warner, 87 Conn. 461 (1913), 88 Atl. 711.

Defendant negligently killed a child in Massachusetts, where the statute provided that he should be liable in damages in the sum of not less than $500 nor more than $10,000, to be assessed with reference to the degree of his culpability, one-half to be for the use of the widow and one-half for the use of the children of the deceased, or if no widow the whole to the use of the next of kin. The court said:

> "We do not enforce the foreign statutes which are penal. We do not enforce the law of another jurisdiction which we conceive to be injurious to our public rights or to the interests of our citizens or which offend our morals or contravene our public policy or violate our positive laws. We have never allowed a recovery in a case of negligent death upon any theory save that of

just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law." (Citing cases.)

IV.

There is no question but that the Legislature of New Mexico in the enactment of Sec. 1820, clearly discriminated between common carriers and other corporations and individuals. This is clearly shown in the case of *Romero v. A. T. & S. F. Ry. Co., supra.* It is further to be noted in the case just cited that the court mentions the statute of the state of Colorado as being practically identical with the New Mexico statute. The court made this further comment:

> "The statute of the state of Colorado is practically identical with our own, and in construing that statute, the Supreme Court of Colorado said: 'The Legislature discriminated between common carriers and other corporations and individuals. They confined section 1 to the former, while section 2 includes the latter. They desired to impose a different liability upon common carriers from that resting upon all other persons, and chose this way of doing it.' *A. T. & S. F. Ry. Co. v. Farrow,* 6 Colo. 498."

It is contrary to the public policy of California to differentiate between common carriers

and other defendants in personal injury cases with respect to the measure of damages. In that state the rule of compensation applies in favor of all and against all, so that neither plaintiff's poverty nor defendant's wealth shall be permitted to augment damages for negligence causing death.

Story v. Green, 164 Cal. 768;
Lange v. Schoettler, 115 Cal. 388;
Redfield v. Oakland Ry., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765;
Estate of Riccomi, 185 Cal. 456;
Powers *et al.* v. Sutherland Auto Stage Co., 213 Pac. (Cal.) 494.

The refusal of state courts to entertain actions on foreign laws not harmonizing with the policy of the forum is not condemned by this court—is indeed approved and adopted.

Slater v. Mexican National R. Co., 194 U. S. 120, 48 L. Ed. 900, was an action in the federal court in Texas to recover for death suffered in Mexico. The court considers the Mexican statute and the provisions made by that statute with respect to decree, damages and parties benefited, and adds:

> "The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statute. What the Circuit Court

did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. * * * Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts." (Citing cases.)

V.

It is submitted that section 1820 of the New Mexico statutes upon which plaintiff's alleged cause of action must be predicated, which arbitrarily declares a forfeiture and requires the payment of $5,000.00 neither less nor more exclusively in the case of the death of a person resulting from injuries incurred while a passenger upon a railway or stage line, regardless of damages, is so widely at variance with and so radically different from the settled policy of California, respecting the measure of damages, that such foreign statute would not be administered or enforced by the courts of California.

It is further submitted that the New Mexico statute is directly opposed to the policy of California in that it treats common carriers, in case of the death through negligence of a person as passenger, as *sui generis*, whereas, in California, but one cause of action is given, a single standard of liability created, against all

tort feasons, be they individuals, corporations or common carriers. It is perceived that the New Mexico statute is further radically different in that regard and that these are material departures from California laws and policies.

In conclusion, we respectfully submit upon the authorities cited and for the reasons hereinbefore given, that section 1820 of the statutes of New Mexico is not enforcible for the benefit of the plaintiff in error in this action.

Therefore, it is submitted that the judgment of the Circuit Court of Appeals ought to be reversed; and the judgment of the District Court in favor of the petitioner affirmed.

Aug. 27, 1923.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 268.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Petitioner and Defendant in Error,
vs.
O. J. Nichols,
Plaintiff in Error.

Reply Brief of ~~Plaintiff in Error.~~ Respondent

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TOPICAL INDEX.

PAGE

Statement of the Case 3
Foreword 6
Brief of the Argument 7
Argument 9

I.

Plaintiff in Error Having Become Vested With a Right of Action Under the Law of the State of New Mexico, May Enforce Such Right Within the State of California 9

II.

The Right to Question the Enforcement of a Right Under the Law of Another State Is Restricted to the Citizens of the State Where the Action Is Prosecuted 50

III.

The Full Faith and Credit Provision of the Constitution of the United States Requires the Enforcement of the New Mexico Statute in the State of California 56

IV.

The Law of New Mexico Became a Part of the Contract of Carriage Between the Parties Thereto 62

V.

Conclusion 65

TABLE OF CASES.

PAGE

Atchison, Topeka & S. Fe Ry. Co. v. Sowers, 213 U. S. 55-71 ..... 8, 25

Atchison, Topeka & S. Fe. Ry. Co. v. Sowers, 213 U. S. pp. 55-71 25

Baer Bros. v. Terry, 108 La. 597, 92 A. S. R. 394, 396 64

Boston & M. R. R. v. Hurd, 108 Fed. 116 7

Boston & M. R. R. v. Hurd, 108 Fed. 116 24

Boston & M. R. R. v. Hurd, 108 Fed. 116-12, pp. 122-123 28

Chap. 191, Public Statutes of New Hampshire 39

Clay v. Atchison, T. & S. Fe Ry. Co. (Tex.) 228 S. W. 907 43

Conklin v. United States Shipbuilding Co., 123 Fed. 915-916 60

Dale v. Atchison, Topeka & Santa Fe R. R. Co., 57 Kan. 601, 47 Pac., 521 41

Dale v. Atchison T. & S. F. Ry. Co., 57 Kan. 601, 47 Pac. 521 11

Dale v. R. R., 57 Kan. 601, at page 487 37

Dennick v. Central R. R. Co., 103 U. S. pp. 11-21 18

Dexter v. Edmans, 89 Fed. 470 49

Hanna v. State Trust Co., 70 Fed. p. 8 61

Held v. Dist. of Columbia, U. S. Supreme Court, Advance Opinions #15 of date June 15, 1922, p. 503 ..... 8, 55

Herrick v. Minneapolis & St. L. R. Co., 47 Am. Rep. 771 28

Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11 12

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482..8, 24, 37

PAGE

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482..... 24

Hill v. Boston & N. R. R., 89 Atl. pp. 482-487..... 37

Huntington v. Attrill, 146 U. S. pp. 657, 686..... 21

Huntington v. Attrill, 146 U. S. 657-686.....7, 23, 36

Illinois Cent. R. Co. v. Ihlenberg, 75 Fed. 873..... 30

Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411-416..... 8

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687 7

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687 24

Matheson v. Ry. Co., 61 Kan. 667..... 37

McManus v. Red Salmon Canning Company, 37 Cal. App. 133 16

Miami Copper Company v. State, 17 Ariz. 179, Ann. Cas. 1916 E. 494..... 46

Minor on Conflict of Laws, Section 5, pp. 9-10; Section 7, pp. 12-13; Section 8, p. 16..... 8

Minor on Conflict of Laws, Section 5, Page 9..... 52

Mo. Pac. v. Ault, #256 U. S. 554..... 45

Mo. Pac. Co. v. Humes, 115 U. S. 512, 29 L. Ed. 463 34

Morissette v. Canadian Pac. Ry. Co. (Vt.), 56 Atl. 1102 24

Morisette v. Canadian Pacific Ry. Co., 56 Atl. 1102 .....8, 24

Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-193 .....7, 24

Northern Pacific Ry. Co. v. Babcock, 154 U. S., pp. 190-193 12

Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-203 28

PAGE

Northern Pac. Railway Co. v. Babcock, 154 U. S. 190-193 24
People v. Davis, 147 Cal. 350 16
Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69 11
Raisor v. Ry. 215 Ill. 47 37
Ryan v. North Alaska Salmon Co., 153 Cal. 439 ....7, 15
Slater v. Mexican Nat. R. Co., 194 U. S. 120 43
Stewart v. Railway Co., 168 U. S. 445 7
Stewart v. Railway Co., 168 U. S. 445 24
Stratton v. Stratton, 239 U. S. p. 55 16
Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. pp. 354-361 58
Tennessee Coal I. & R. Co. v. George, 233 U. S., pp. 354-361 25
Tennessee Coal I. & R. Co. v. George, 233 U. S. 354-361 ..... 8, 25, 58
Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593 .....7, 24
Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593 24
Weissengoff v. Davis, 260 Fed. 17 (C. C. A., 4th Dis.) 7, 24, 31
Weissengoff v. Davis, 260 Fed. 17 (C. C. A. 4th Dis.) 24
Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., 503-509 .....7, 35
Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., pp. 503-509 24

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Reply Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error, O. J. Nichols, is a resident of the state of California. The defendant in error, Atchison, Topeka and Santa Fe Railway Company, is a citizen of the state of Kansas. The complaint in this action was originally filed in the Superior Court of the county of Los Angeles, state of California. The defendant duly appeared therein and filed its petition for removal of said action to the District Court of the United States for the Southern District of California. The plaintiff in his complaint seeks to recover damages for the death of his

wife, a passenger with himself on one of the defendant's east bound trains in the state of New Mexico. The particulars concerning the death of the plaintiff's wife and the negligence of the defendant causing the same are fully set forth in the complaint.

A jury trial was, in writing, expressly waived by the parties and the cause was tried by the court without a jury. The court made and filed its findings in favor of the plaintiff upon all of the allegations of fact alleged in the complaint, except the court found the plaintiff's damages to be the sum of $5,000.00 instead of a greater sum alleged in the complaint [Tr. p. 48]; however, the court's conclusions of law were to the effect that plaintiff could not recover the damages so suffered and judgment was accordingly entered in favor of the defendant.

The decision of the Circuit Court of Appeals reversed the judgment of the District Court and ordered judgment on the findings in favor of plaintiff in error for the sum of five thousand dollars.

The statute involved in this action, and construed in the decision of the Circuit Court of Appeals, was originally adopted as section 1820 of the New Mexico Annotated Statutes of 1915. It is referred to in the Compiled Laws of New Mexico of 1884 as section 2308 and in a later edition as section 3212. It reads as follows:

"Whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance, whilst in charge of the same as driver, and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad, or any part thereof, or in any locomotive, or in any stage-coach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employee, engineer, or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive car, stage-coach, or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered, FIRST, by the husband or wife of the deceased; or, SECOND, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or THIRD, if such deceased be a minor, and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

We shall throughout this brief refer to the quoted section as section 1820.

Foreword.

As preliminary to the argument in this case, we suggest the following:

No state policy, in our opinion, requires the courts of one jurisdiction to accord to the courts of a state where the law gives the right, a superior ability to their own to try the facts and render the judgment, and no sound state policy will deny to the citizens of a state the right to try their cases therein, or require them to travel several thousands of miles—perhaps over the road of an offending defendant in error—to obtain relief where the service of process may be made within the jurisdiction.

If this contention is sound, then wherein does the judgment of a state have a superior right of enforcement over the law of such state in its transit into judgment in another state. Surely it must be admitted that the sovereign right of pronouncing a judicial judgment is as great in one state as it is in another, and section 1 of article IV of the Constitution of the United States seems to give sanction to this position.

The fact that the law of one state is different from the law of another state by no means in-

dicates that the enforcement of the law of the one state is contrary to the policy of the other.

BRIEF OF THE ARGUMENT.

I.

The right of action of plaintiff in error rests upon section 1820 of the laws of New Mexico, and the cause of action is not contrary to any established policy or declared law of California. The enforcement of the right is authorized by decision of the Supreme Court of California. Also, federal courts enforce such right as a matter of general law.

Ryan v. North Alaska Salmon Co., 153 Cal. 439;

Huntington v. Attrill, 146 U. S. 657-686;

Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-193;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Stewart v. Railway Co., 168 U. S. 445;

Boston & M. R. R. v. Hurd, 108 Fed. 116;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

Weissengoff v. Davis, 260 Fed. 17 (C. C. A., 4th Dis.);

Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., 503-509;

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482;

Morisette v. Canadian Pacific Ry. Co., 56 Atl. 1102.

II.

Defendant in error is not entitled to raise any question concerning the policy of the state of California because it is not a citizen of that state.

Held v. Dist. of Columbia, U. S. Supreme Court, Advance Opinions #15 of date June 15, 1922, p. 503;

Minor on Conflict of Laws, Section 5, pp. 9-10; Section 7, pp. 12 13; Section 8, p. 16.

III.

The right of plaintiff in error to enforce his cause of action arising under the law of New Mexico is guaranteed by article IV, section 1 of the Constitution of the United States

Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411-416;

Tennessee Coal I. & R. Co. v. George, 233 U. S. 354-361;

Atchison, Topeka & S. Fe Ry. Co v. Sowers, 213 U. S. 55-71.

ARGUMENT.

I.

Plaintiff in Error Having Become Vested With a Right of Action Under the Law of the State of New Mexico, May Enforce Such Right Within the State of California.

With full knowledge of the character of the statutes of New Mexico, the defendant in error, by its initial pleadings herein, unamended throughout the litigation, elected the particular New Mexico statute upon which it would rely to defeat the action, and that statute was not the so-called "penal" statute (section 1820) of the statutes of New Mexico, but was section 1821 of the statutes of that state, relating to damages in general for death (being other than for the death of a passenger on a railroad), which statute provides for compensatory damages agreeable to the law of California and also for exemplary damages which may be disregarded. This section 1821 is set forth in the demurrer of defendant in error [Tr. pp. 25-29].

In its demurrer, under sub-section 4 of said section 1821, defendant in error contends that the action should be prosecuted only by the personal representatives of the deceased, and by paragraph 8 of its answer, it pleads the legal effect thereof as an affirmative defense [Tr. pp. 37-88].

Having thus taken the position that the action could be defeated for the want of a plaintiff in the person of a personal representative as required by said section 1821, and having carefully ignored section 1820 which provides for the prosecution of the action by a surviving spouse—the plaintiff in this case—it would seem as though defendant in error had restrained itself by the rule of estoppel from raising any question arising under the unpleaded statute, section 1820, claimed to be contrary to the policy of California. Of course, there is no question but that Federal courts take judicial notice of the laws of each state without their being pleaded and make application thereof, but we do not comprehend how such judicial notice can permit a party to plead one statute of New Mexico agreeable to the law of California, and at the same time claim another statute of New Mexico, penal in form, to be contrary to the law of California and for that reason, a bar to the remedy.

Defendant in error, having presented its brief solely with reference to the legal effect of section 1820 of the statutes of New Mexico, we must necessarily meet that issue as presented and do so as follows:

The contention of the defendant in error that a right of action arising under the law of New

Mexico is not enforceable in California, grows out of a mistaken notion that there is an attempt to engraft upon the law of California, the law of New Mexico. This narrow and unsound view is in substance, the doctrine of the small group of cases cited by defendant in error beginning with Dale v. Atchison T. & S. F. Ry. Co., 57 Kan. 501, 47 Pac. 521 and ending with Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69. These decisions fail to consider the fact that there is a distinction between the assertion of a right in one state which a litigant has acquired and owns by reason of the law of another state and the making of the law of such other state, the law of the forum. It would indeed be a strange doctrine that would permit a defendant who has incurred a liability in one state under the laws thereof to escape that liability by moving to another state where a different law may prevail with reference to the subject of the litigation, and yet the doctrine contended for by defendant in error and the decisions relied upon by it would make such result possible. Personal service could not be made upon the fugitive defendant in the state where the law and facts give the right and the action could not be enforced in the jurisdiction in which the fleeing party had taken refuge because the law thereof differed from the law of the *lex loci*.

Furthermore, the contention of the defendant in error based upon the decisions cited by it, misconceives the meaning and extent of the phrase "policy of the state" or "policy of the law of the forum" and similar expressions. This Honorable Court in the case of Northern Pacific Ry. Co. v. Babcock, 154 U. S. pp. 190-193, defines what such policy is in a portion of the decision therein quoted from Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, the quotation appearing at page 198 as follows:

> "To justify a court in refusing to enforce a right of action which accrued under the law of another state, *because against the policy of our laws*, it must appear that it is against good morals or natural justice, or that, for some other reason, the enforcement of it would be prejudicial to the general interest of our own citizens."

We understand from such language that unless the right to be enforced under the law of another state is against good morals or natural justice or is prejudicial to the general interests of the citizens of the state where its enforcement is sought, there is no violation of the policy of the state, or in other words, that no such policy in reference to rights arising therein is considered as invaded unless in the manner indicated.

The Federal and state cases upon which the plaintiff in error in the case at bar relies, give a consideration and weight to the ownership of a right acquired in one state and the enforcement thereof in another state which is wholly lacking in the cases cited by the defendant in error.

We can see no distinction in the universally accepted principle of law that a contract for the payment of interest which is valid in the state where made, is enforceable in another state, even though it would be violative of the usury law of such state, if made therein, and the right of a litigant who has sustained damages in and under the law of one state to recover the same in another state, although the law of the *lex loci* may differ from the law of the forum. The plaintiff in error is a citizen of California, seeking in his own state to enforce an obligation against the defendant in error, which as shown by the record in this case, is a citizen of Kansas. The decisions generally hold as we shall hereinafter more particularly point out, that the doctrine known as "the policy of a state" is intended for the benefit of the citizens of the state to which the policy is applied. The defendant in error, therefore, not being a citizen of California, is not entitled to urge the objection made by it to the detriment of a citizen of California, or otherwise.

The decision of the Circuit Court of Appeals in the case at bar considered the question and decided that it is not against the policy of the state of California to enforce a right in that state arising under the New Mexico statute, as shown by the following excerpts therefrom:

> "(1) The law of the case, as we understand it, is this: The defendant in error having removed the action from the court of the state in which it was brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rule that would have controlled it had it not been so removed. It was so held in effect by this court in the case of Northern Pacific Railway Co. v. Kempton, 138 Fed. 992, 998, 999, 71 C. C. A. 246. See also, Spokane & I. E. R. R. v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 50 L. Ed. 1060, L. R. A. 1915F, 736, and cases there cited.
>
> (2) It is not contended that the cause of action of the plaintiff in error was given by the common law, but by a statute of the state where the accident to and the death of his wife occurred, which statute reads as follows: * * *"
>
> "(3) The defendant in error contends—and such was evidently the theory upon which the judgment of the court below rested—that the policy of the above statute is so opposed to the policy of the state of California that no court of that state would enforce it. If the statute can be properly held to be a penal one, that is undoubtedly true. It was said by the Supreme Court, speaking through Chief Justice Marshall in

> The Antelope, 10 Wheat. 66, 123, 6 L. Ed. 268:
>
> 'The courts of no country execute the penal laws of another.'
>
> No more do the courts of any state of the United States execute the penal laws of another state. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law. Huntington v. Attrill, *supra;* Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. In Huntington v. Attrill the Supreme Court said (146 U. S. at pages 673 *et seq.*, 13 Sup. Ct. at page 230 (36 L. Ed. 1123)):" * * * 286 Fed. page 3. Nichols v. A. T. & S. F. Ry. Co., 218 Fed. pp. 2-3.

In the case of Ryan v. North Alaska Salmon Co., 153 Cal. 439, the Supreme Court of California gave judicial sanction to the enforcement of an action for damages based upon a foreign statute. At page 439 the court said:

> "The demurrer was properly sustained. Where the action, as here, is transitory in its nature, a right or liability imposed by the statute of another state, or of the United States, may in proper cases be asserted and enforced in this state. Such

> may be taken to be the settled rule since the case of Dennick v. Railway, 103 U. S. 11. But the courts of this state will only entertain such an action for the purpose and upon the terms permitted by the *lex loci*. In other words, the right to prosecute this action in California is permissible only if permissible under the laws of Alaska, and only upon such terms as the laws of Alaska prescribe. And, as at common law, there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff to plead and prove such law."
>
> 153 Cal. 439.

The case of McManus v. Red Salmon Canning Company, 37 Cal. App. 133, cited by counsel for petitioner and defendant in error, does not establish the law of the state of California; the District Court of Appeal is an intermediate appellate court. There are five such courts in California, rendering at times conflicting decisions. The lack of finality of the decisions of these courts has been decreed by the Supreme Court of California in the case entitled People v. Davis, 147 Cal. 350, and this Honorable Court has, as we understand it, decided that such intermediate courts are not courts of last resort. (Stratton v. Stratton, 239 U. S. p. 55.) It is worthy of note that two of the three judges rendering the decision in McManus v.

Red Salmon Canning Company were sitting as judges pro tem.

The decision in McManus v. Red Salmon Canning Company does not, however, decide what the law of California is with reference to the enforcement of the law of another state if contrary to the alleged policy of California. The decision rested upon the ground that the section of the Alaska statute claimed to contravene the policy of California, had been repealed and superceded by the law of 1913, which the court held did in fact give a right of action in California to the plaintiff McManus. Furthermore, the point urged against the alleged obnoxious Alaska statute was not the one urged in the case at bar, but was based upon the ground that the Alaska statute permitted damages recovered for the death of a person to go to the creditors, whereas the California statute created the cause of action for the benefit of the relatives of the decedent, who have a right to look to him for aid and support, based upon their pecuniary loss, the pith of the decision being stated at page 137-138 as follows:

> "Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for

> the death of decedent where no one was shown to have suffered any pecuniary loss thereby. But the second statute pleaded, chapter 45 of the Session Laws of Alaska for 1913, which is a later enactment than section 1185, presents the matter in an entirely different light. Section 1 of that act gives the right of action against the employer for wrongful death of an employee to his personal representative 'for the benefit of his widow and children, if any, if none for his parents, if none then for his next of kin *dependent* upon him,' and section 4 provides that the action shall not be maintained unless it be shown that there are beneficiaries such as are described in the clause just quoted. We are satisfied that this act in effect repeals the provisions of section 1185 in so far as cases between employer and employee are concerned, and provides a remedy for the wrongful death of an employee which is in full accord with the spirit of our law."

Since the decision of this Honorable Court in Dennick v. Central R. R. Co., 103 U. S. pp. 11-21, the courts have uniformly held that a personal action acquired by a person in one state is transitory in its nature and may be enforced in any other state. At pages 17-18 this Honorable Court says:

> "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a

civil action to recover damages for a civil injury.

It is, indeed, a right dependent solely on the statute of the state, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the Northern District, were competent to try a case when the parties were properly before it. See Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Bl. 983; McKenna v. Fisk, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable by going to

> New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases." See *ex parte* Van Riper, 20 Wend. 614; Lowry v. Inman, 46 N. Y. 119; Pickering v. Fisk, 6 Vt. 102; R. R. Co. v. Sprayberry, 8 Bax. (Tenn.) 341; R. R. Co. v. Miller, 19 Mich. 305.
>
> 103 U. S. pp. 17-18.

The contention of the defendant in error that the so-called penal statute of New Mexico is contrary to the policy of California and therefore unenforceable in that state, is but a change in form of the objection made to the effect that a penal statute is not enforceable in jurisdictions other than the state of its creation. In all of the cases, so far as we have been able to ascertain, that have come before either the federal or state courts involving the question of so-called

penal statutes, the objection urged has included the point that the law of the place differed materially from the law of the forum.

In the leading case upon the subject, Huntington v. Attrill, 146 U. S. pp. 657, 686, quoted in part in the opinion of the Circuit Court of Appeals in the case at bar, 286 Fed. p. 1 [Tr. pp. 67, 75] this Honorable Court had under consideration a statute of the state of New York making each director of a corporation signing a certificate or false report concerning the affairs of the corporation liable for all of the corporation's debts. In that case judgment had been rendered in favor of Collis P. Huntington for $100,000 against one Attrill, by virtue of the statute mentioned. Enforcement of such judgment was thereafter sought in the state of Maryland by a creditor's bill in equity to set aside the transfer of stock by said Attrill to his wife and daughters. The Court of Appeals of Maryland held that the judgment was not enforceable in Maryland by reason of the penal character of the statute upon which it was founded, the decision making special reference, among other things, to the fact that the liability was not limited to the amount of the creditor's loss.

This Honorable Court in stating the issue involved, at page 664, said:

"The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that state and in Maryland, a penalty which could not be enforced in the state of Maryland; and that the judgment obtained in New York for this penalty, while it 'merged the original cause of action so that a suit cannot be again maintained upon it' and 'is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings,' yet did not change the nature of the transaction, but, within the decision of this court in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, was in its 'essential nature and real foundation' the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the state in which it was rendered."

At page 673 the court said:

"The question whether a statute of one state, which in some aspects may be called

penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick v. Railroad Co., 103 U. S. 11."

At page 683 the court said:

"In this view that the question is not one of local but of international law, we fully concur. The test is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. Burgess v. Seligman, 107 U. S. 20, 33; Texas & Pacific Railway v. Cox, 145 U. S. 593, 605, above cited."

Huntington v. Attrill, 146 U. S., p. 683.

The decision in Huntington v. Attrill reversed the judgment of the Court of Appeals of Mary-

land, holding the New York statute remedial of private rights, and, therefore, enforcible in Maryland. That decision is the foundation of numerous decisions in the federal and state courts upholding the right to maintain actions for death arising upon state statutes differing materially from the law of the forum, among which may be mentioned the following:

Northern Pac. Railway Co. v. Babcock, 154 U. S. 190-193;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Stewart v. Railway Co., 168 U. S. 445;

Boston & M. R. R. v. Hurd, 108 Fed. 116;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

Weissengoff v. Davis, 260 Fed. 17, (C. C. A. 4th Dis.);

Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., pp. 503-509;

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482;

Morissette v. Canadian Pac. Ry. Co., (Vt.), 56 Atl. 1102.

Other cases involving the same point where the injuries did not result in death are:

Atchison, Topeka & S. Fe Ry. Co. v. Sowers, 213 U. S. pp. 55-71;

Tennessee Coal I. & R. Co. v. George, 233 U. S., pp. 354-361.

A case in which a statute of Massachusetts similar to the New Mexico statute, is that of Boston & M. R. R. v. Hurd, 108 Fed. 116, decided by the Circuit Court of Appeals of the First Circuit. The suit was instituted in the Circuit Court of New Hampshire by the administrator of Alice Hurd, who, while a passenger of the Boston & M. R. R., was killed in the state of Massachusetts. The statute of Massachusetts as it existed at the time the cause of action arose, provided a maximum penalty of $5000 and a minimum penalty of $500 for the death of a passenger, without any guide by which the jury was to determine where the fine should rest as between the extremes named. We quote excerpts from the decision as follows:

> "The most important one we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between a statute strictly penal, or *qui tam*, and one in the nature of a penal statute, is pointed out in Huntington

v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the executive of the state by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239." (P. 119.)

"It is settled that the mere fact that the proceeding is by indictment does not necessarily determine its intrinsic purpose; yet, if the statute stopped there, it would seem impossible that there could be any proceedings in any other state than that where it was enacted. When a state sees fit to interpose its grand jury, and makes that an essential part of the proceeding, it is difficult to perceive how any other state could substitute other process therefor. In the case on which subsequent cases have been built up, Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, which held that an administrator appointed under the laws of New York might bring an action for death arising under the statutes of New Jersey, the court was careful to rely on the fact that the right of action was not limited by the statutes of New Jersey to the personal representatives of the deceased appointed in that state; but this rule is not broad enough to reach a case where an indictment is required. In Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, it was held that an action might be brought in the District of Columbia by an admin-

istrator there appointed, the action being based on a statute of Maryland giving damages arising out of a death, although the statute directed that suit should be brought in the name of the state. The statute, however, gave an action strictly civil, and for damages suffered by the relatives for whose benefit the suit was brought; and the Supreme Court held that, as the state was only a nominal party, the question of who should be plaintiff was not a substantial one. The opinion, however, reaffirmed the rule stated in Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376, and in Bank v. Franklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, that where a statutory remedy is given, and the suit is brought in another state than that which enacted the statute, all its substantial terms must be obeyed." (Pp. 119-120.)

"There can be no question that the court regards statutes of this class as remedial, notwithstanding their form, and even when the proceedings must be by indictment. The effect of the weight which the supreme judicial court of Massachusetts gave this case by its method of referring to it tends to a like result in that state. We may add that Shear. & R. Neg. (5th Ed.) paragraph 132, regards the statute in question here as strictly penal. Notwithstanding this, we on the whole conclude that its substantial purpose is remedial. If it still stood as originally framed, and so permitted no form of proceeding except by indictment, we might find difficulty in giving it effect except in the courts of Massachusetts; but the civil remedy, given in the alternative, as we have shown, is a flexible one, and, although the declaration was finally based

> on the Massachusetts statute, it leaves this case within the jurisdiction of the United States Circuit Court in the district of New Hampshire."
>
> Boston & M. R. R. v. Hurd, 108 Fed. 116-12, pp. 122-123.

In the case of Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-203, this Honorable Court referred to Huntington v. Attrill as authority in upholding the judgment of the Supreme Court of Minnesota. The action was brought by an administrator in Minnesota to recover $25,000 damages for the killing of one Munro on the Northern Pacific Railway in the territory of Montana. The law of the territory of Montana provides that where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may recover such damages as under all the circumstances of the case may be just; the laws of Minnesota, in force at the time of the death, was limited to $5,000. There was a verdict and judgment in favor of the plaintiff for $10,000. The opinion of the court sustained the judgment, holding that the right to recover was governed by the *lex loci* and not by the *lex fori*. At pages 197-198 the court quotes approvingly from Herrick v. Minneapolis & St. L. R. Co., 47 Am. Rep. 771, as follows:

"'The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto.*'"

The opinion continues:

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the righ of action accrued must concur in holding that the act done negatives a right of action. We admit that some text-writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it.

But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where

made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens. * * *

The contract of employment was made in Montana, and the accident occurred in that state, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*."

154 U. S., pp. 197-198.

In the case of Illinois Cent. R. Co. v. Ihlenberg, 75 Fed. 873, a decision of the Circuit Court of Appeals, written by Judge Taft, now Justice Taft, the court had under consideration the question of the right of a person injured in the state of Mississippi to prosecute an action for damages therefor in the state of Tennessee; the Constitution of Mississippi making a defendant liable for an injury caused by defective machinery, unless the injury was due to the recklessness of the employee; the law of Tennessee

providing that knowledge by the defendant of a defect in the machinery causing the injury, is a defense to an action therefor against the employer. At page 879 it is said:

> "The only remaining question for discussion is whether a federal court in Tennessee will enforce the Mississippi Constitution with respect to the tort committed in that state. It is well settled by the decisions of the federal courts that, 'While it is true that the statutes of a state have in themselves no extraterritorial force, yet rights acquired under them are alwayse enforced by comity in the state and national courts in other states, unless they are opposed to the public policy or laws of the forum.' "

The Circuit Court of Appeals for the Fourth Circuit in the case of Weissengoff v. Davis, 260 Fed. at page 17, had under consideration a demurrer to the jurisdiction of the U. S. District Court of the state of Maryland to try a case and recover damages for the killing of a sheriff in West Virginia. In holding in favor of such jurisdiction, the court said:

> "A demurrer to the jurisdiction was overruled and the jury found a verdict of $10,000 for the plaintiff. In support of the demurrer to the jurisdiction defendant relies on Ash. v. B. & R. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461, holding that the statute of West Virginia conferring a right of action for wrongful death is not enforceable in the court of Maryland,

> the Maryland statute on the subject being similar, but not identical. That case was decided in 1876, and it does not seem that the court of Maryland has been called on since to review the question. But it is now settled beyond debate by the Supreme Court of the United States that, when the statute of one state takes away the common-law obstacle to a recovery for an admitted tort, an action for the tort committed in that state may be maintained in any state where the statute of the state in which the cause of action arose is not in substance inconsistent with the statute or public policy of the state in which the right is sought to be enforced. The question is one of general law, and the decisions of the Supreme Court are binding in this court. Dennick v. R. R. Co., 103 U. S. 11, 26 L. Ed. 439; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. * * *"

Weissengoff v. Davis, 260 Fed. 17.

Another and important case following the doctrine announced in Huntington v. Attrill is Laura v. E. I. Du Pont De Nemours & Co., decided by Judge Veeder of the District Court, E. D. New York, 241 Fed. 687, the decision being to the effect that it is unnecessary to find a similar law in the forum to that of the *lex loci*, and that the damages sought were not of that penal character unenforceable in another state. At page 690 the court says:

"I do not concede, however, the validity of the assumption that the exercise of jurisdiction in such cases is dependent upon the existence in the forum of a statute similar to the foreign statute under which the right of action arose. The general rule is that actions for personal torts are transitory in their nature and may be brought wherever jurisdiction of the wrongdoer can be obtained. Wherever such a right of action has become fixed and legal liability incurred, whether at common law or under a statute, it will be enforced in another state unless there is a good reason for refusing to enforce it. If statutory, it will be enforced, not because of the existence of the statute, which of course does not extend *ex proprio vigore* beyond the boundaries of the state in which it is enacted but because it is a right which the plaintiff legitimately acquired and which still belongs to him. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found."

Again at pages 694 and 695 the court says:

"In applying the foregoing principles to the right of action given by the Virginia statute, it must not be overlooked that in federal courts the issue is one of general jurisprudence, upon which the state decisions are not conclusive. * * * In view of Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, there can be no claim that the action is penal. No diffi-

culty in applying it is suggested. It is not unreasonable; nor is it asserted that its enforcement would injuriously affect any general interest of the people of this state. The differences to which attention was called at the outset are claimed, however, to contravene the public policy of this state. Whatever latitude may be permissible in state courts in refusing jurisdiction on grounds of local policy, the rule laid down for federal courts by the Supreme Court in Huntington v. Attrill and other cases above cited seems to leave no room for mere questions of comity, save as they may be involved in the underlying principles of jurisprudence. Greaves v. Neal (C. C.), 57 Fed. 816.

"The facts that the jury may apportion the damages among the beneficiaries, and that the beneficiaries may not in every case be the same under each statute, do not warrant rejection on that ground. Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. Nor does the fact that the Virginia Statute allows elements of damage which are not recognized under the New York statute."

Further support of the validity of the statute in question is given by the case of Mo. Pac. Co. v. Humes, 115 U. S. 512, 29 L. Ed. 463. The opinion is by Justice Field, the question involved being whether double damages afforded by the state of Missouri for the killing of livestock where the railroad company had failed to fence its road, as required by an act of the Legislature, was in violation of the "due process" and

"equal protection of the laws" provisions of the Federal Constitution. At page 466 L. Ed. the court said:

> "The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."

In the case of Whitlow v. Nashville, Chattanooga & St. Louis Railroad Company, 68 L. R. A., pp. 503-509, the Supreme Court of Tennessee dealt with a case for the recovery of damages for death occurring on the defendant's railroad in Alabama. The defendant contended that the Alabama statute was penal by reason of leaving the question of amount of recovery to the jury without guide or restraint, and for the further reason that recovery could be had without reference to the deceased leaving kin or evidence of loss of personal service. The

court cites as authority, Huntington v. Attrill, and at pages 506-507 discusses the Alabama cases arising under the statutes and concludes on page 508 as follows:

> "What is here said in the quotation just made is the logical result of all the preceding Alabama cases on the subject, when one goes to the very substance of them disregarding mere formal expressions; and it is impossible, in the face of this decision, to hold that actions under the statute are penal in the international sense.
>
> "The action is not so repugnant to the public policy of our state so that we should, for that reason, decline to entertain it. The bringing and disposition of suits for damages caused by wrongful death is a matter of everyday occurrence in the courts of this state. And as said by Mr. Justice Brewer in Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 449, 42 L. Ed. 537, 539, 18 Sup. Ct. Rep. 105-106: 'A negligent act causing death is, in itself, a tort, and, were it not for the rule founded on the maxim, *actio personalis moritur cum persona*, damages therefore could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states in more or less conformity to what is known as 'Lord Campbell's Act,' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the

death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. Dennick v. Central R. Co., 103 U. S. 11, 26 L. Ed. 439.

In the case last cited, the court, speaking through Mr. Justice White, quoted with approval the following language from Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, 47 L. Rep. 771, 16 N. W. 413, which we also adopt, *viz.*" (Same language as heretofore quoted by Supreme Court of U. S. in Northern Pacific Ry. Co. v. Babcock, *supra.*)

The Supreme Court of the state of New Hampshire in the case entitled Hill v. Boston & N. R. R., 89 Atl. pp. 482-487, had under consideration the Massachusetts statute hereinbefore referred to, except at the time of the decision the Massachusetts statute had been amended so that it provided for a minimum fine of not less than $500 and a maximum fine of not more than $10,000.

The decision of the New Hampshire court in Hill v. Boston *et al.*, after dissenting from the doctrine announced in the cases of Raisor v. Ry. 215 Ill. 47, Matheson v. Ry. Co., 61 Kan. 667, and Dale v. R. R., 57 Kan. 601, at page 487, says:

"It is further argued that the public policy of this state does not sanction such a suit as this. But the case of State v.

> Railroad, *supra,* is positive evidence that a suit of this general character was not opposed to public policy up to 1879, when the statute under which that case was decided was repealed, and an action of tort by the deceased's administrator or executor was authorized for the benefit of the relatives of the deceased. Laws 1879, c. 35. And this is the statutory law at the present time. P. S. v. 191, Secs. 8-13. The fact that our law in many respects is materially different from that of Massachusetts is not of itself sufficient to warrant the conclusion that the court in its discretion ought to dismiss an action upon the latter statute. Rice v. Hosiery Co., 56 N. H. 114. To entertain this suit is not so repugnant to our judicial system or to the interests of our citizens as to be contrary to what is known as the public policy of the state."

The defendant in error at p. 49 of its brief, mistakenly asserts that the New Hampshire decision just quoted accords with the law of that state. The New Hampshire statute is purely compensatory and the error of defendant in error is made apparent by the statute itself from which we quote as follows:

> "Sec. 11. The damages recoverable in any such action shall not exceed seven thousand dollars."
>
> "Sec. 12. If the administrator of the deceased party is plaintiff and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in conse-

quence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury and his capacity to earn money, may be considered as elements of damage in connection with other elements allowed by law."

(Chap. 191, Public Statutes of New Hampshire.)

In the case of Morisette v. Canadian Pacific Ry. Co., 56 Atl., 1102, the Supreme Court of Vermont decides that a law of Canada allowing damages for personal injuries dissimilar to the law of Vermont is enforceable in the latter state.

At page 1103, the court said:

"It is further objected that the Canadian law, as alleged, although neither criminal nor penal, is so different from ours that we ought not to administer it. Comity does not require us to take up and enforce the law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to our own public policy. The law we are considering is not claimed to be open to either of the first two objections, but is claimed to be open to the third, because it is so different from the law of Vermont. Some states have adopted this view, declining to administer foreign laws unless closely analogous to their own. Mexican National Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W.

39

857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Anderson v. M. & St. P. Ry. Co., 37 Wis. 321; Richardson v. N. Y. C. R. Co., 98 Mass. 85. But we believe the sounder opinion is that a court should not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked. Judged by that test, the ruling was correct. Herrick v. Minneapolis, etc., Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Higgins v. R. Co., 155 Mass. 180, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick v. R. Co., 103 U. S. 11, 26 L. Ed. 439; McLeod v. R. Co., 58 Vt. 727, 6 Atl. 648; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410."

In the case of Marshall v. Wabash, 46 Fed. 269, Judge Sage rendered an oral opinion from the bench, in which he held that he was not bound by the decisions of the Supreme Court of Missouri to the effect that a similar statute was compensatory, and he further held that it was a penal statute and could be enforced only in the state of its creation, "much for the same reason that criminal statutes have no extraterritorial force." The decision was rendered in April, 1891, nearly two years before the decision of the Supreme Court of the United States in

Huntington v. Attrill, *supra*. It is not in harmony with that case or any of the federal cases in which similar statutes were considered, hereinbefore cited. It is directly contrary to the case of Boston and M. R. R. v. Hurd, 108 Fed. 116, by the Circuit Court of Appeals of the First Circuit, upon a like statute fixing a maximum and minimum recovery in case of the death of a passenger on a railway train. The case seems to us to be wholly without weight as an authority.

The case of Dale v. Atchison, Topeka & Santa Fe R. R. Co., 57 Kan. 601, 47 Pac., 521 (the defendant therein being the defendant in error in the case at bar) does not refer to the case of Huntington v. Attrill or any of the Federal or state cases following that decision. It relies upon an early decision in Kansas as a precedent, and finds the New Mexico statute obnoxious, because "in New Mexico it may be strictly penal for it might happen that the person killed was a burden upon his family, contributing nothing to them," which reasoning might permit the filing of a counterclaim or a cross-complaint by an offending railway company demanding judgment against the widow and orphans of the deceased for services rendered. It is perhaps supererrogation to remark that the result contended by the defendant in error, as announced

in the Dale case, is not based upon the experience and history of the average American family. The case of Matheson, *et al.* v. Kansas City, Ft. S. & M. R. Co. is a Kansas case resting upon the Dale case, and adds nothing to that authority; also it does not mention the case of Huntington v. Attrill or any of the cases built thereon. The case of Raisor v. Chicago & Dalton R. R. Co., 215 Ill. 47, 74 N. E. 69, rests largely upon the cases of Marshall v. Railway, *supra*, Dale v. Atchison, Topeka & S. F. Ry. Co., *supra*, and Matheson v. R. Ry. Co. *supra*. The Raisor case is the only case presented by the defendant in error which mentions the case of Huntington v. Attrill. It approves the criticism of the decision in Huntington v. Attrill by Minor on Conflict of Laws in the following statement:

> "Minor, in his work on Conflict of Laws (page 22, note 3), criticizes much that is said in the opinion, and on page 24 says: 'So far as private international law is concerned it matters not whether that punishment is inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or through the medium of a civil action by the party injured for penal damages. In substance it is an act of punishment. It is punitive in either case.' "
>
> (A. S. R. 106, p. 158.)

The Raisor case entirely disregards the doctrine of Huntington v. Attrill, and may stand as

an authority only if the doctrine of that case is repudiated.

Clay v. Atchison, T. & S. Fe Ry. Co. (Tex.) 228 S. W. 907, is included in the authorities of defendant in error. The decision is based on the report of the Commission of Appeals. Like its companion cases, it fails to mention the case of Huntington v. Attrill, and other cases following that case.

Finally, defendant in error refers to the decision of this Honorable Court in Slater v. Mexican Nat. R. Co., 194 U. S. 120, and quotes a portion of the decision therein. There is no similarity between that case and the case at bar. The decision of the Circuit Court of Texas was reversed by the Circuit Court of Appeals, which latter decision was sustained by this Honorable Court because the Circuit Court awarded a judgment not permitted by the law of Mexico. At pages 128-129 the decision reads as follows:

> "Then by article 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration; but 'the obligation shall cease; 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other

case in which, according to law, the deceased, if alive, would not be required to continue the support.' It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. See also, Arts. 1376, 1377, of the Code of Civil Procedure, and Penal Code, Bk. 2, Art. 363.

The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong, and was excepted to specifically. But we are of the opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce liability

> conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by Art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. Mexican Nat. R. Co. v. Jackson, 89 Tex. 107 etc."

The fact that the Mexico statute giving the right of action was entirely disregarded by the Circuit Court of Texas, sufficiently distinguishes the Slater case from the case at bar where the objection of the defendant in error is that the foreign statute has been given effect. Furthermore, the dissimilarity of the Mexico law was of such a character that no scheme of procedure existed under the law of Texas by which the Mexico law could be given effect.

Defendant in error cites the case of Mo. Pac. v. Ault, #256 U. S. 554 as authority against enforcing the right sued on herein. The opinion clearly indicates that the claim for penal damages therein asserted was denied enforcement because it ran counter to a federal law, to-wit, the "Federal Control Act" which did not permit the sovereign authority of the United

States to be held liable in any manner not consented to therein. It is obvious that the defendant in error can claim no such immunity for itself.

On the return of Mr. Nichols to California after the loss of his wife by reason of her misfortune while a passenger in the care of defendant in error, he found the defendant in error subject to service of process. No question of venue or of the jurisdiction was raised by the defendant in error except as to its right to remove the case to the federal court on the ground of diversity of citizenship. If the contentions we have advanced are sound, the defendant in error, upon the death of plaintiff's wife in the manner found by the district court, forthwith became indebted to the plaintiff in the sum of $5,000.00, and such indebtedness is enforcible in the state of California.

There is a collection of quotations from authorities in the case of Miami Copper Company v. State, 17 Ariz. 179, Ann. Cas. 1916 E. 494, so fully establishing the fact that a statutory penalty is nothing more or less than an ordinary debt that we here present them for consideration. The quotations begin on page 498 of the Ann. Cas. Rep. in Rann v. Green, as follows:

> " * * * Chitty says: 'Debt is a more extensive remedy for the recovery of money

than assumpsit, or covenant; for it lies to recover money due upon legal liabilities, or upon simple contracts express or implied, whether verbal or written, and upon contracts under seal or of record, and on statutes, by a party aggrieved, or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty.' 1 Chitty on Pleadings, 101.

"'Where a statute gives a forfeiture of a sum of money, or penalty, the action of a debt lies, because the statute creates a direct debt and a consequent duty.' 1 Chitty on Pleadings, 104.

"In the Laws of England, edited by the Earl of Halsbury (volume 1, part 7, Forms of Actions—Old Forms of Action), it is said: 'Debt lay to recover definite sum due on records, * * * or by common informers and persons aggrieved under penal statutes, even though the statutes did not expressly give a right of action for the penalty.'

"A liability imposed by statute is no greater than a common-law liability. In either case the duty to discharge it is the same. When, therefore, the statute creates a debt, or gives to the party the right to demand from another a sum of money, the law raises an implied promise to pay it. Chief Baron Comyn says:

"'Debt lies upon every contract, in deed or in law. As if an act of Parliament gives a penalty, and does not say to whom nor by what action it shall be recovered, an action of debt lies upon such statute by the party aggrieved.' Comyn's Digest, title Debt, A, 1.

"'Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the state to obey the laws.' Smith Thompson, J., in Stearns v. U. S., 2 Paine 301, 311, 22 Fed. Cas. No. 13,341.

" * * * While it is, no doubt, true that the action, being based on a violation of the statute, sounds in tort (Chaffee v. U. S., 18 Wall. 516, 21 U. S. (L. Ed.) 908), yet, as there stated, 'debt lies for a statutory penalty, because the sum demanded is certain.'

"The mode in which penalties shall be enforced, whether at the suit of a private party or at the suit of the public, is a matter of legislative discretion, and where the penalty is given by statute, and there is no specified mode of recovery presented, an action of debt will lie. 30 Cyc. 1344, 1345.

"Generally speaking, it is immaterial whether the obligation arose by contract or by operation of common or statute law, in what manner the obligation was incurred, or by what the obligation was incurred, or by what the obligation is evidenced, if it possesses the essential requisites of a foundation for this action debt will lie. 13 Cyc. 408.

"At the common law, the action of debt is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise, which the law annexes to the liability. 18 Am. & Eng. Enc. of Law, 274.

"In U. S. v. Mundell, 1 Hughes 415, 6 Cal. (Va.) 245, 27 Fed. Cas. No. 15,834, Iredell, circuit judge, says:

"'The truth is, it is sometimes necessary to distinguish between actions of debt at common law and actions of debt upon a statute, for particular reasons not applicable to the mode of trial. For instance, it is necessary to show it to be "an action on the statute," because otherwise no cause of action will appear, a penalty in the case not existing at common law, and therefore creating no such contract. But when the cause of action is shown, the principles of common law pervade the whole of the trial.'

"In short, while the statute in question creates a new liability unknown to the common law, when such liability does arise it is then ascertained that there is a debt on a liability created by the statute, and such a case is upon the principles of the common law cognizable at law in an action of debt on the liability thus created."

If the principle announced in the paragraph last above quoted from, to the effect that the common law procedure is sufficient to afford a remedy for the recovery of a statutory liability not existing at common law, the liberal code practice of California ought to accomplish the same result, and certainly a federal court by its own procedure in matters of general law can entertain an action for the recovery of a debt arising under the statute of another state. Otherwise it would be unable to perform its constitutional duty of enforcing the laws of the several states.

Dexter v. Edmans, 89 Fed. 470.

The defendant in error claims that section 377 of the Code of Civil Procedure establishes a different rule of damages than that afforded by section 1820 of the statutes of New Mexico, and that for such reason the plaintiff in error is without a remedy in the state of California. Section 377 C. C. P. is the substitute in the state of California for Lord Campbell's Act. It takes away the common law disability to sue for the death of one caused by the wrongful act of another, designates the person who may maintain the action, and provides that such damages may be given as under all of the circumstances of the case may be just. The codes of California do not pretend to enact laws with reference to the right of property or causes of action arising in other states, and section 377 C. C. P., in providing a measure of damages, has reference to, and could only have reference to, damages given for the death of a person in California caused by the wrongful act of another in that state.

II.

The Right to Question the Enforcement of a Right Under the Law of Another State Is Restricted to the Citizens of the State Where the Action Is Prosecuted.

It appears from the complaint in this action and defendant's petition for the removal of the case from the state court to the federal court

that the defendant, Atchison, Topeka and Santa Fe Railway Company is and at all times has been a citizen of the state of Kansas, its line of railroad extending from the state of California to the city of Chicago, Illinois, and traversing en route the state of New Mexico. The plaintiff is a citizen of the state of California, as was also his wife, at the time they became passengers on defendant's railroad intending to visit the city of Chicago. The death of plaintiff's wife occurring in the state of New Mexico of course deprives plaintiff of the benefit of the law of California providing for recovery in such cases, which defendant in error says conflicts with the law of New Mexico, and for that reason argues that plaintiff was not entitled to any recovery whatever. It may be remarked that the law of New Mexico in question became a part of the contract under and by which the defendant in error undertook to carry plaintiff and his wife to the city of Chicago, and therefore the question of enforcement of contractual obligations arising in different states may have a place for consideration herein. Further reference to this subject will be hereinafter made, but at the present we desire to direct the court's attention to the limitation of the rule that the courts of one state may decline to enforce the laws of another state, and to point out that such

rule is invoked only to avoid the result of injustice to the people of the state where the action may be prosecuted, and to suggest that the corollary to this proposition is that if the non-enforcement of the law of the foreign state will work an injustice to the citizens or a citizen of the state where the action is prosecuted, then it does not lie in the mouth of a defendant to say that the law of the foreign state should not be enforced. First it is important to consider underlying reasons for holding the laws of one state unenforceable in another state. We quote from Minor on Conflict of Laws, section 5, page 9, as follows:

> "There may be said to be five instances wherein it is generally considered that the municipal law of the state where the question is raised (*lex fori*) forbids the enforcement of a foreign law. (1) Where the enforcement of the foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property." (P. 9.) * * *
>
> "In view of these frequently recurring exceptions, and to avoid lengthy paraphrases, we will in future designate as 'The Proper Law' that law which, upon

general principles, is the proper law to govern the case." (Pp. 9-10.)

It may be noticed that in subdivision 1 reference is made to the contravention of some established and important policy of the state of the forum; in section 2 reference is made to an injustice and injury to the people of the forum, thereby giving emphasis to the fact that it is for the benefit of the state or the people of the state that the policy of non-enforcement of a foreign law must rest upon. Exceptions to the non-enforcement of a foreign law are referred to in section 7, pages 12 and 13 of the same work, as follows:

"This exception, like most of the others, is but a branch of the first, but, by reason of its frequency and importance, is treated separately.

"It is natural, and not at all to be reprobated, that the courts of the forum should refuse to enforce a foreign law, if to do so would result in injustice to their own people. The object of the enforcement of a foreign law in any case is to mete out, as far as possible, exact justice to all concerned, as well as to give due effect to the laws of other states. But the first and most important of these objects fails altogether when the enforcement of the proper law would result in injustice and loss to innocent citizens of the forum. As between the latter and strangers, it is not remarkable that the courts should elect in a close case

> to decide the matter in accordance with the *lex fori*, thus giving their fellow citizens the advantages conferred upon them by the law under which they live and ordinarily transact their business. The observance of comity towards other states cannot reasonably be expected at the expense of injustice to residents of the forum, for whose benefit the courts and the law are primarily instituted. The existence of this exception to the enforcement of the "proper law" is beyond dispute, though its limits are not yet precisely defined."

Again the same author in the same section, pages 16 and 17, says:

> "Another question arises which involves the scope of this exception. Does it apply only to citizens of the forum, or should it be extended to those, not citizens, who are domiciled there, or even to those who are casually present there? As between the states of this Union, if the party upon whom the foreign law operates injuriously is a citizen of the United States, he must be held a citizen of the forum if he is domiciled there. But if he be not domiciled there, or if he be an alien, or if the suit be instituted in a foreign country, the point becomes important."

Within the rules above prescribed, we submit that a judgment in favor of the plaintiff for damages by reason of the loss of his wife, as authorized by the laws of the state of New Mexico, would not contravene any established

and important policy of the state of California; nor would the same result in injustice and loss to innocent citizens of the forum. Neither would the enforcement of such right contravene the canons of morality established by civilized society. On the contrary, it would be in consonance with the policy of the law of California which affords a remedy by civil action for the enforcement and protection of rights and the redress and prevention of wrongs. (Code of Civil Procedure, Sec. 21.) The judgment herein of the Circuit Court of Appeals renders justice to a citizen of California, and, it may also be added, justice to the defendant in error.

The defendant does not come within any of the exceptions as prescribed by the rule last above quoted whereby it may complain against the enforcement of the law in question, for defendant is not only a foreign citizen, but it does not and cannot occupy the position of a natural person who might be domiciled or even casually present in the state of California.

The lack of status enabling defendant to complain against the jurisdiction of a federal court sitting in California to enforce the New Mexico statute is emphasized by the recent case of Held v. District of Columbia, U. S. Supreme Court Advance Opinions, No. 15, of date June 15th, 1922. At page 503 it is said:

"It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him."

III

The Full Faith and Credit Provision of the Constitution of the United States Requires the Enforcement of the New Mexico Statute in the State of California.

This Honorable Court in the recent case entitled, Kenney v. Supreme Lodge of the World Loyal Order of Moose, 252 U. S. pp. 411-416, construes a statute of the state of Illinois which provided that no action should be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct. The Supreme Court of Illinois held that as by the terms of the statute the original action could not have been brought there, the courts of that state had no jurisdiction of a suit upon the judgment obtained in Alabama. This Honorable Court reversed the case and at page 416 said:

"Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of com-

petent jurisdiction within the state, 'and not elsewhere.' But when the cause of action is created, the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this court. Tennessee Coal, I. & R. Co. v. Georgia, 233 U. S. 354, 58 L. ed. 997, L. R. A. 1916D, 685, 34 Sup. Ct. Rep. 587; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; and had these decisions been otherwise, (416) they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister state.

As the judgment below upheld a statute that was invalid as construed, the writ of error was the proper proceeding, and the writ of certiorari must be dismissed. 252 U. S. p. 416."

As we read the decision of this Honorable Court in the Kenney case we understand the principle established thereby to be that where a cause of action is created in one state the party to whom it belongs is entitled to enforce it in any other state, and we think without regard to the fact whether or not the right of action has passed into a judgment. The contention of the defendant in error in this case is in effect, that the law of California prohibits the prosecution of an action in that state to recover for death which has arisen under the law of another state. No such law exists in Cali-

fornia and if the Supreme Court of that state should hold that the policy of California forbids such action therein, which it has not, such decision would deny to a party plaintiff the protection afforded by article 4, section 1 of the Constitution of the United States.

In the case of Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. pp. 354-361, this Honorable Court had under consideration a phase of the full faith and credit ~~decision~~ of the Constitution in reference to transitory actions and also took notice of the necessity of prosecuting such actions in a state to which a defendant may have removed after the cause of action arose. At page 359, this Honorable Court said:

> "But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced 'in any court of competent jurisdiction within the state of Alabama. * * *' But the owner of the defective machinery causing the in-

jury may have removed from the state, and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state, nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama, and for that, or other, reason may have found it to his interest to bring suit by attachment or *in personam* in a state other than where the injury was inflicted.

The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right; and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action."

233 U. S., pp. 359-360.

The expression "Full faith and credit," as we understand it, means that credit which the state itself gives to the acts when proven. The public acts referred to in article 4, section 1 of the Constitution of the U. S. are the legislative

acts, the enacted laws of the state; their enforcement is guaranteed in the same sentence of the constitutional provision that guarantees the enforcement of judicial proceedings of each state. The command of respect of the *law* of a state is as definite as it is in reference to a judgment of such state, which necessarily must rest upon the law.

If a legal right is guaranteed by the Constitution its enforcement is not to be stayed by any state policy; an act of the Legislature of a state declaring such right unenforceable as being against state policy or otherwise would be void. (Kenney v. Supreme Lodge etc., *supra.*)

Again, if the right is a constitutional one, it does not require the aid nor involve the uncertain application of comity for its enforcement. Such seems to have been the view expressed by Circuit Judge Putnam in a case entitled Conklin v. United States Shipbuilding Co., 123 Fed. 915-916:

> "The rule of so-called comity has little influence with me. The best late writer on international law—Dicey—says very truly: 'The term "comity" as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the court. I know of few propositions that now come

> before the courts which are not governed by law, and in this case I must be governed by the law as practiced, and by the precedents, and not by any mere matter of comity."

The Circuit Court of Appeals of the Eighth Circuit in an opinion by Judge Caldwell in the case of Hanna v. State Trust Co., 70 Fed. p. 8, has declared the same principle with reference to legal rights, quoting in the opinion this Honorable Court as authority:

> "The rights of the citizen, lawfully acquired by contract, are under the protection of the Constitution of the United States, and like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent on the discretion of the chancellor than they are on the discretion of the Legislature. 'Rights,' says the Supreme Court of the United States, 'under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise.'"

In our opinion, the command of the Constitution of the United States that full faith and credit shall be given in each state to the public acts of every other state is equally a command upon the courts of each state to hear and determine causes arising under the laws of any other state.

IV.

The Law of New Mexico Became a Part of the Contract of Carriage Between the Parties Thereto.

It is an elementary principle of law that the law of the state where the contract is to be performed forms a part of every contract. It may therefore be said that the defendant contracted to carry plaintiff and his wife with the expectation and obligation on its part that in case of the death of either in the state of New Mexico recovery would be had in accordance with the laws of that state and it can make no difference to the defendant in what jurisdiction it answers to its obligations imposed by statute and contemplated by its contract.

We have before said that the statute of New Mexico formed a part of the defendant's contract of carriage with the plaintiff and therefore, in that aspect of the case it is governed by those decisions relating to the enforcement of contracts executed in foreign jurisdictions. In any event, a right created by a statute is fully as worthy of enforcement as one created by contract.

The Supreme Court of Wisconsin in the case of International Harvester Co. etc. v. McAdam, 26 L. R. A. (N. S.) pp. 774-781, had under

consideration the obligations of a contract of a married woman made in South Dakota, at the time of the execution of which all the makers were residents of South Dakota. Such contract was legal under the laws of South Dakota but illegal under the laws of Wisconsin. The contract, however, was enforced on the ground that being valid in the place where executed, it should be enforced, although under the laws of Wisconsin such a contract executed in that state would be unenforceable. At page 779, the court says:

> "Many illustrations might be given of instances of contracts made elsewhere, which would not have been valid if made in the state where judicial enforcement was attempted, including instances where the invalidity was referable to statutory prohibitions, being enforced by judicial remedies in the latter jurisdiction. Such as contracts providing for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum."

Again illustrating the point that the non-enforcement of the law of a foreign jurisdiction is for the benefit of the citizen of the state alone when the action was prosecuted, and holding the promissory note of a married woman executed in the state of Missouri to be enforceable in the state of Louisiana where such contract

would have been void, is the case of Baer Bros. v. Terry, 108 La. 597, 92 A. S. R. 394, 396. At page 395 A. S. R. the court says:

> "Nor do we agree with the counsel's contention that assuming defendant to have been liable on the notes before she came to this state, the law of this state prohibiting wives from binding themselves for the debts of their husbands precludes recovery against her. The law is satisfied and its whole object and purpose is accomplished when Louisiana wives are protected against binding themselves for the debts of their husbands; this protection is not extended to Missouri wives, and if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate, or dissolve, valid obligations; to such it is a healthful and bracing atmosphere."

Likewise, we say here that when the defendant, a citizen of Kansas, appeared in the action at bar, it was subject to all the obligations it had assumed under the law of the state of New Mexico, whether with or without reference to the law of that state forming a part of the contract of carriage with the plaintiff.

V.

Conclusion.

In conclusion, we respectfully submit that the doctrine approved by the cases cited by defendant in error has been restricted to the states where such decisions were rendered. The Federal courts and other state courts in which the question has been presented for decision have established a contrary doctrine.

The Judgment of the Circuit Court of Appeals enforces a substantial right belonging to the plaintiff in error, amply supported by the law of the state where the injury was inflicted upon facts found by the trial court against which no complaint is made, a reversal being asked by defendant in error upon no better ground than its theory that a dissimilarity in the laws of the two states requires the same.

It is indeed a hazardous enterprise for a citizen to exercise his liberty to travel if he shall be required to journey across the continent to enforce his right of action against a common carrier. The request of the defendant in error that this Honorable Court declare for the first time that a state policy exists in California which no California court has yet declared is extraordinary.

For the reasons given, we submit that the judgment of the Circuit Court of Appeals should be affirmed.

November 30, 1923.

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ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* NICHOLS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 268. Argued February 26, 1924.—Decided April 7, 1924.

A statute of New Mexico (Anno. Stats., 1915, § 1820) provides that, whenever any person shall die from an injury occasioned by negligence of the servants, etc. of a railroad company whilst running a train, the company "shall forfeit and pay for every person or passenger so dying" the fixed sum of $5,000.00, to be sued for and recovered by the husband in case of the death of a wife.

(a) *Held*, that the purpose is not to punish an offense against public justice, but to afford redress for a civil injury; and, therefore, enforcement of the right accruing from a death in New Mexico by an action in another State is not objectionable to the principle that one State will not enforce the penal laws of another. P. 350.

(b) The law of California (Code Civ. Proc., § 377) measures the damages for death by wrongful act by the pecuniary loss resulting to the surviving relative, while the above cited act of

New Mexico fixes the amount, in the class of cases covered, at $5,000.00. *Held*, that there is here no such difference of policy as should deny the aid of the state and federal courts in California to the enforcement of a cause of action arising under the New Mexico statute in New Mexico. P. 352.

286 Fed. 1, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the Railroad Company, and directing entry of judgment for the plaintiff, Nichols, in his action to recover damages for the death of his wife, alleged to have been caused by the company's negligence. The action came into the District Court by removal from the Superior Court of California.

Mr. Robert Brennan, with whom *Mr. Edgar W. Camp* and *Mr. Gardiner Lathrop* were on the brief, for petitioner.

Mr. Milton K. Young, with whom *Mr. Lyndol L. Young* and *Mr. William K. Young* were on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action for personal injuries received by Nichols' wife while a passenger on a train of petitioner in New Mexico. The injuries resulted in death. The action was brought in one of the Superior Courts of the State of California and removed on petition of petitioner to the United States District Court for the Southern District of California, Southern Division.

The amount sued for was $35,586.42, being composed of the elements of $15,000.00 for the loss of services and advice of the wife, $20,000.00 for the loss of her society, love and affection, and $586.42 for various specified services.

Judgment was rendered for petitioner, with costs. It was reversed by the Circuit Court of Appeals with directions to enter judgment for Nichols in the sum of $5,000.

The question of liability in some court petitioner does not contest. It contests only that the law of New Mexico upon which liability of petitioner was based is in conflict with the policy of the State of California expressed in the laws and decisions of the State. We therefore immediately encounter as an element for consideration the law of New Mexico. It is as follows: "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car, or train of cars, . . . the corporation . . . in whose employ any such officer, agent, servant, employe, engineer or driver, shall be at the time such injury was committed, . . . shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued [for] and recovered; First, by the husband . . ." Anno. Stats. 1915, § 1820.

The Circuit Court of Appeals sustained the law. Judge Ross, addressing himself to the contention that the law could not be enforced or administered in California or in a federal court sitting in California, and considering the ground of the contention to be that the law is penal, said, "But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law." For this were adduced *Huntington* v. *Attrill*, 146 U. S. 657; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593.

The principle announced is contested and the application of the cases adduced to support it. The attack is

naturally directed against *Huntington* v. *Attrill* as it declares itself to be in submission and sequence to the other cases as well as the expression of independent reasoning and conclusion. The question there, as here, was upon the character of a statute having "aspects" of penalty. The statute was, however, excluded from the class of criminal laws which had their venue of commission and trial where committed, for it was decided to be, applying and quoting from *Dennick* v. *Railroad Co., supra,* "though a statutory remedy, a civil action to recover damages for a civil injury." And this because the Court decided that when a statute like the one passed on is involved in consideration, the question whether it is one "which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

The reasoning of the Court is very complete with the pertinence of cases, and it has the supplement of a number of State rulings which the Circuit Court of Appeals has adduced.

The law of New Mexico is within the principle and description of those rulings, and of *Huntington* v. *Attrill.* It is in reparation of a private injury, not in punishment of "an offence against the public justice of the State." Its reparation is in a fixed amount, it is true, but it is in an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the State would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because so defined.

Against this conclusion an argument can be opposed and is opposed,—one not without strength and the support of cases. We are unable to yield to it. We repeat, we think the motive and effect of the law is not punishment in the sense of a penal law, but remuneration—"damages for a civil injury." And a peculiar injury—one resulting from death and its deprivations—deprivations difficult to estimate (and which the common law did not estimate in individual injury and redress), and, therefore, we think properly within the power of the State—its power to make provision for the controversies and rights that may grow out of the relations of its people.

The contention of petitioner is, as we understand it, not that damages in redress of death are opposed to the policy of California, but only when damages are given in a fixed amount as provided by the law of New Mexico, the Code of Civil Procedure of the State giving such damages only "as under all the circumstances of the case may be just,"[1] therefore, confining the damages to compensation for pecuniary loss suffered by surviving relatives of the deceased. This may be conceded—there is nothing in the law of New Mexico that transcends the purpose. It does not preclude the recovery of damages—it only defines them, recognizing, as the Supreme Court of California has recognized, the incapability of precise accuracy being attained either by court or jury of the damages that may result from the death of a person to surviving relatives. (*Redfield* v. *Oakland C. S.*

[1] "Sec. 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Ry. Co., 110 Cal. 277, 285. See also *Ryan* v. *North Alaska Salmon Co.*, 153 Cal. 438.)

We do not regard, therefore, the code of the State as expressing the policy of the State to be that the aid of its courts and of the federal courts sitting in the State are to be denied the power to enforce the redress given by the law of the State where the injury was inflicted, the law not being penal.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.